

REPORTS

OF

CASES

DETERMINED

IN THE

Court of Sudder Dewanny Adawlut,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

A NEW EDITION.

BY **W. H. MACNAGHTEN, ESQ.**

REGISTER OF THAT COURT.

VOLUME III.

CONTAINING

SELECT CASES OF 1820, 1821, 1822, 1823, AND 1824.

CALCUTTA:

PRINTED AT BISHOP'S COLLEGE PRESS, BY H. TOWNSEND.

1827.

J U D G E S

OF THE

COURT OF SUDDER DEWANNY-ADAWLUT

PRESENT

DURING THE PERIOD OF THESE REPORTS.

IN 1820.

JOHN FENDALL, Chief Judge, appointed to Council in May.
SIR J. E. COLIBROOKE, Brit. Chief Judge, appointed 20th of May.
WILLIAM LEYCESTER, Chief Judge, appointed 8th of December.
WILLIAM EDWARD REES, absent from 14th of July.
SAMUEL THOMAS GOAD.
COURTNEY SMITH, Officiating Judge, from 25th of February (Second Judge, 8th of December.)
WILLIAM DORIN, Officiating Judge, from 8th of December.

IN 1821.

WILLIAM LEYCESTER, Chief Judge.
COURTNEY SMITH.
SAMUEL THOMAS GOAD.
JOHN SHAKESPEAR, appointed 27th of February.
WILLIAM DORIN, Officiating Judge.

IN 1822.

WILLIAM LEYCESTER, Chief Judge.
COURTNEY SMITH.
SAMUEL THOMAS GOAD, (absent for two months, from 18th of January).
JOHN SHAKESPEAR.
WILLIAM DORIN, Officiating Judge.
CHARLES ELLIOTT, Officiating Judge from 18th of January, (officiated two months)

IN 1823.

WILLIAM LEYCESTER, Chief Judge, (absent from December).
COURTNEY SMITH.
JOHN SHAKESPEAR.
WILLIAM DORIN, appointed Fourth Judge, 3rd of January (absent from 9th of October).
JOHN HERBERT HARRINGTON, Officiating Judge, from 30th of October.
WILLIAM BYAM MARTIN, appointed 27th of February.

IN 1824.

JOHN HERBERT HARRINGTON, officiated as Chief Judge, from 5th of February.
COURTNEY SMITH.
JOHN SHAKESPEAR, (absent from October)
WILLIAM BYAM MARTIN.
JOHN AHMUTY, Officiating Judge, from 5th of February, (absent from September)
CUTHBERT THORNHILL SEALY, Officiating Judge, from 6th of December.

TABLE

OF

THE CASES REPORTED

IN THIS VOLUME.

	Page		Page
Ahoo Moohummud Khan and others, Omar Khan, son of Alum Beg, <i>v.</i>	179	Bheechook Singh and others, Bal Dut Doobey and Government, <i>v.</i>	5
Afzul Ah, Kurta Rai and Surnam Rai, <i>v.</i>	3	Bheeloo (Mussummaut), pauper, <i>v.</i> Phoolchand	223
Agund Rai, Ihas Coonwur, pauper, widow of Bussawun Singh and mother of Rajkoomar Singh, a minor, <i>v.</i>	37	Bhowanee Buksh, pauper, <i>v.</i> Kheit Sing	202
Amanee Tewaree, <i>v.</i> Rji Rughoobuns Suhai and others..	363	Bhowaneepershad Goh, <i>v.</i> Mussummaut Taramunee	138
Arman Pande and others, <i>v.</i> Nouruttun Koonwur, widow of Bvja Singh, deceased, and guardian of his minor son Khetur Singh	78	Bhowanee Singh and Ramnidh Singh, <i>v.</i> Pranput Singh and Runjeet Singh	284
Avietick Ter Stafanoos, <i>v.</i> Ithaja Michael Arratoon	9	Bhugoo Sing, <i>v.</i> Doonda Sing.	328
Ayabutee, Mussummaut, (since deceased,) <i>v.</i> Rajkishen Sahoo	28	Blugwunt Singh, pauper, <i>v.</i> the Collector of Goruckpore, Gopal Buksh and Rajah Qbhey Singh	325
B.		Bhuwanee Suhai, <i>v.</i> Uchruj Lal	225
Bal Dut Doobey and Government, <i>v.</i> Bheechook Sing and others	5	Bijja Dibia (Mussummaut), <i>v.</i> Mussummaut Unnapoorah Dibia	26
Balnath Sahoo and Gopeenath Sahoo, <i>v.</i> Rajah Buddun Mohun Singh and others....	48	Bijruttun Das, and on his death Cawn Doss and the Collector of Benares, <i>v.</i> Raj Gir and Cosa Gir.	88
Balungee Surrun (Rajah), Moohummud Ismail Jemadar, heir of Qurar Moohummud, <i>v.</i>	346	Bishenpersaud and Devnarayun Rai, Mussummaut Taramunee Dibia, <i>v.</i>	387
Bechun Lal and Sheopershad, <i>v.</i> the Collector of Government Customs at Benares	354	Bisumber Sahoe and others, Pirthee Singh, <i>v.</i>	298
Beerpershad Chowdree, <i>v.</i> Rajnarain Das (pauper)	343	Brijpal Das and others, heirs of Gokul Das, deceased, Ulruck Singh, <i>v.</i>	417
		Budder oodeen, Tubeeb Shah, <i>v.</i>	162
		Buddun, Mohun Singh (Rajah) and others, Balnath Sahoo and Gopeenath Sahoo, <i>v.</i>	48

	Page		Page
Buksh Beebee (Ranee), <i>v.</i> Na- dir Beebee	59	Collector of Bundelkhund, <i>v.</i> Churun Das Byragee	415
Bungelund Bunhoofee, Ram- kunjhee Rai and others, <i>v.</i> ...	17	— of Bundelkhund, <i>v.</i> Hachee Geer	56
Burkut Oonisa and Noorool Husin Khan, Cheyn Singh, ' <i>v.</i>	278	— of Goruckpore, Gopal Buksh, and Rajah Obhey Sing, Bhugwunt Singh (pau- per), <i>v.</i>	325
C.		— of Goruckpore, <i>v.</i> Toorunt Geer and Sindha Geer	351
Chester, George, Commercial Resident at Maldah, Mussum- maut Kun Son, mother and guardian of Ramsoonar Mo- teeloll, son of Sumbhoo Mo- teeloll, <i>v.</i>	169	— of Government Cust- oms at Benares, Sheopershad and Bechun Lal, <i>v.</i>	354
Cheyn Singh, <i>v.</i> Burkut Oonisa and Noorool Husin Khan ..	278	— of Moorshedabad, <i>v.</i> Lalla Sohun Lal	65
Chowdhree Dood Raj Singh, <i>v.</i> Moohumud Yahia Khan	332	— of Zillah Rajshahy, <i>v.</i> Rughoonath Nundee and Gholaum Moortuza	400
Chundernarain Rai, his mo- ther, and Radhamadho Ghose (his guardian), Jowahir Singh, <i>v.</i>	83	Collis, John, Mr. James Morris, <i>v.</i>	117
Chundun Koonwaree, <i>v.</i> Sheo Ratna Singh and others	275	Cosa Gir and Raj Gir, the Col- lector of Benares and Birj- ruttun Das, and on his death ' Cawn Doss, <i>v.</i>	88
Churun Das Byragee, the Col- lector of Bundelkhund, <i>v.</i> ..	415	Culub Ali Khan, and others, ' Uzeezoonisa, pauper, <i>v.</i>	321
Chutroo (Mussummaut), <i>v.</i> Mus- summaut Jussa, <i>v.</i>	141	D.	
Clark, David, (representative of Dr. Turnbull, deceased), Naroopa Naik and another, <i>v.</i>	248	Dasee Daseea (Mussummaut) ' pauper, Tarnee Churn and Ka- lee Churn, sons of Parbuttee Bhurn Nag, paupers, <i>v.</i>	397
Collector of Allahabad, Baboo Ratna Chandra and Manick Koonwaree, <i>v.</i>	280	Debnath Mukmoodar, <i>v.</i> Kish- enpershad Ghoen	200
— of Allahabad, Raja Putnee Mull, <i>v.</i>	304	Deedar Hosein (Rajah), <i>v.</i> Ranee Zuhoor Oonisa	46 & 164
— of Bareilly, on the part of Government, <i>v.</i> Major Hearsey	242	Deepoo (Mussummaut) pauper, <i>v.</i> Goureshunker	307
— of Benares and Birj- ruttun Das, and on his death ' Cawn Doss, <i>v.</i> Cosa Gir and ' Raj Gir	88	Devnarayun Rai and Bishenper- shad, Mussummaut Taramu- nee Dibia, <i>v.</i>	387
— of Benares, on the part of Government, <i>v.</i> Baboo Guruck Sing	381	Dhunmunnee (Mussummaut) a pauper, <i>v.</i> Sonatun Sahoo and others	30
— of Benares, <i>v.</i> Muha Narain Singh	390	Dhunmunnee (Mussummaut), Rajchunder Das, <i>v.</i>	361
— of Benares, <i>v.</i> Ooma Beebee, widow, and Rugho- nath, grandson of Sumbhoo- jee Patur.	52	Dianut Beebee and others, Sa- hib Jan Khatoon, <i>v.</i>	12
		Dilaram and others, sons of Kishn? Ram, <i>v.</i> Roopchund Sahoo	24
		Dirpal Singh, Kishendas, <i>v.</i> ..	43
		Doonda Sing, Bhugoo Sing, <i>v.</i> ..	328

	Page		Page
Doorgapershaud Bhuttacharjya, Khaja Arratoon and Mussumaut Kureem Oonisa, v.	34	and others.	5
Doorpudee Dasee, Saleem Oollala, and others, v.	319	Government, Koonjbeharee Lal, v.	86
Doorpudee (Mussummaut), v. Haradhun Sircar and others F.	74	Goviud Das, Baboo Ramchand, v.	127
Fukhuroonisa Begum, Meer Ubdool Kureem, v.	44	Goureesunker, Mussummaut Deepoo, pauper, v.	307
Fuqeer Moolhunnud, pauper, Mussummaut Kandee, pauper, v.	295	Gourmonee (Mussummaut) and others, Meer Ashruf Ali, v.	98
G.		Gungadhur Peharee and others, v. Hurchunder Ghose and others.	253
Ghalib Jung Khan and others, Seam Begum and others, v.	335	Gunga Mya, b. Kishenkishore Chowdhry.	128
Gholaum Moortuza and Rughoonath Nundee, Collector of Zillah Rajshahy, v.	400	H.	
Gholaum Unbia Khan, v. Mochee Lal,	1	Haradhun Sircar and others, Mussummaut Doorpudee, v.	74
Gooroo Dutt Singh, heir of Bisheu Singh, deceased, and Rughoonath Pathuck, manager on the part of Wahnoopersand Singh, a minor, son of Bahadoor Singh, Mordun Singh and others, v.	239	Hersey, Major, the Collector of Bareilly on the part of Government, v.	242
Gopal Buksh, the Collector of Goruckpore, and Rajah Obhey Singh, Bhugwunt Singh, pauper, v.	325	Hidayut Ali and Qadir Ali, v. Prem Singh.	250
Gopalchund and Kanthchund Pande, guardian of Beharee Lal (a minor); Oudan Sing, and Tej Sing (a minor), through his guardian the above Oudan Sing, v.	205	Hingun (Mussummaut) and others, Mirza Qasim Ali Beg, v.	152
Gopaul Lal and others, v. Mulharaja Pitumbar Sing	54	Hukeem Wahid Ali, b. Khan Beebee	102
Gopeechurn Burril, v. Mussummaut Lukhee Ishwuree Dibia, and Rao Ram Sing, guardian of the minor Suruswutee Dibia	93	Hurbuns Lal and others, Ishree Pershad and Mussummaut Pana, v.	177
Gopeemohun Baboo, Ramkishu Rai and another, v.	340	Hurchunder Ghose and others, Gungadhur Peharee and others, v.	253
Gopeenath Sahoo and Balnath Sahoo, v. Rajah Buddun Mohun Singh and others.	48	I.	
Government and Bal Dutt Doobey, v. Bheechook Singh		Ilachee Geer, the Collector of Bundelkhund, v.	56
		Ilias Coonwur, pauper, widow of Bussawun Sing and mother of Rajkoomar Sing, a minor, v. Agund Rai	37
		Inavut Ahmud, and Naema Beebee, Sadhoo Lal and others, v.	159
		Indrahee (Ranee), mother and guardian of Ramnath Gurg, a minor, v. Ramkoomar Burm	392
		Ishree Pershad and Mussummaut Pana, v. Hurbuns Lal and others.	117
		Iswar Chunder Pal, Ladlee Mohun Thakoor, v.	282

	Page		Page
J.		Khaja Michael Arratoon, Avietick Ter Stafanoos, v.	9
Jankeershah (Baboo), v. Maharaja Oodwunt Narain Singh	270	Khaja Neekoos Marcar, v. Ramlochan Ghose	221
Jankeeram Singh (Rajah) and Rajah Oodwunt Singh, Ranees Kishenmune, v.	228	Khan Beebee, Hukeem Wahid Ali, v.	102
Jan Khatoon, Roshun Khatoon, v.	414	Khet Sing, Bhowanee Buksh, pauper, v.	202
Jeetun Das, v. Lal Roodur Purtab Singh	96	Khuzur Oonisa Khanum (Mussummaut) and others, Mussummaut Shureef Oonisa, pauper, v.	210
Jowahir Pande and others, Munsa Ram, v.	172	Khyrat Ali, son of Syud Ali, Oomaid, v.	258
Jowahir Singh, v. Chundernarain Boy, his mother, and Radhamadho Ghose, (his guardian)	83	Kirtnarain Das and others, v. Rajkoomar Rai and others ..	219
Jugunnath and others, v. Rughoonath Das	311	Kishendas, v. Dirpal Singh	43
Jussa (Mussummaut), Mussummaut Chutroo, v.	141	Kishenkanth Sein and others, Ramdhun Sein and others, v.	100
Jymune Dibia (Mussummaut) v. Ramjoy Chowdree,	289	Kishenkishore Chowdhry, Gunga Mya, v.	128
Jyerkash Singh (Rajah), v. Baboo Saheozada Singh	51	Kishenmune (Ranee), v. Rajah Oodwunt Singh and Rajah Jankeerah Singh	228
K.		Kishenpersaud Gooen, Deb-nath Mujmoodar. v.	200
Kaleechurn and Tarneechurn, sons of Parbteechurn Nag, paupers, v. Mussummaut Dasee Dasee	397	Kishnanud Chowdree and others, v. Mussummaut Rookunee Dibia	70
Kalee Das Roy and others, Ramnarain Mitter, v.	420	Koonjbeharee Lal, v. Government	85
Kaleepershad Rai and others, Ramnarain Mitter, v.	372	Kunhya Lal and others, Mohunt Runjeet Geer, v.	68
Kali Khan, v. Rajah Mitterjeet Sing, v.	90	Kunhya Singh, Ooman Dut, pauper, v.	144
Kandee (Mussummaut) pauper, v. Fuqeer Moohummud, pauper	295	Kunwul Bas Koonwur and others, Baboo Sheodasnarain, v.	244
Kanth Chund Pande, guardian of Beharee Lafi (a minor) and Gopalchund, Oudan Sing and Tej Sing (a minor) through his guardian the above Oudan Sing, v.	205	Kureem Oonisa (Mussummaut) and Khaja Arratoon, v. Door-gapersaud Bhuttacharjya	34
Kashee Pande and others, Mndram and others, heirs of Ram Sundar Pande, v.	232	Kurta Rai and Surnam Rai, v. Afzul Ali	2
Khaja Ali and others, Mussummaut Zureenah Beebee, v.	32	L.	
Khaja Arratoon, and Mussummaut Kureem Oonisa, v. Door-gapersaud Bhuttacharjya ..	34	Ladleemohun Thakoor, v. Is-warchunder Pal	282
		Lalla Sohun Lal, the Collector of Moorshedabad, v.	65
		Lal Roodhur Purtab Singh, Jeetun Das, v.	96
		Luchmun Das and others, v. Roopchand and others	3

TABLE OF CASES.

ix

	Page		Page
Lukhee Iswuree Dibia (Mussum- maut) and Rao Ram Sing, guardian of the minor Surus- wutee Dibia, Gopeechurn Burrall, v.	93	Lal, heirs of Bukhtawur Singh, v. Ujaib Rai	41
M.		Mullick Ahmud Khan, v. Pu- dum Singh and others	156
Manick Koonwuree, and Baboo Ratna Chandra, v. The Col- lector of Allahabad	280	Munohar Lal, v. Ramnarain Ghose	66
Meer Ashruf Ali, v. Mussum- maut Gourmunee and others	98	Munas Ram (pauper), v. Jowa- hir Pande and others	172
Meer Sheer Ali and Rajah Sheolal Dobe, v. Sheikh Lootf Ali	63	Murdun Singh and others, v. Rughoonath Pathuck, mana- ger on the part of Vishnoo- persaud Singh, and Gooroo Dutt Singh, heir of Bishen Singh, deceased	239
Meer Ubdool Kureem, v. Fuk- huroonisa Begum	44	N.	
Mirza Qaim Ali Beg, v. Mus- summaut Hingun and others	152	Nadir Beebee, Rancee Bukh- lar Beebee, v.	59
Mirza Qasim and others, Mou- lovee Syud Ashruf Ali, v.	49	Naeemut Beebee and Inayud Ahmud, Sadhoo Lall and others, v.	159
Mitterjeet Sing (Rajah), Kali Khan, v.	90	Naroopa Naik and another, v. Mr. David Clark, represen- tative of Dr. Turnbull, de- ceased	248
Mohun Lal, Sohun Lal and Pokhnarain, v. Mussummaut Seesphool (widow of Ram- dyaul)	114	Noorool Husun Khan, and Burkut Oonisa, Cheyn Singh, v.	278
Mohunt Runjeet Geer, v. Kun- hya Lal and others	68	Nourutton Koonwuree, widow of Byja Singh, deceased, and guardian of his minor son Khetur Singh, Arman Pande and others, v.	78
Moochee Lal, Gholam Unbia Khan, v.	1	Nundram and others, heirs of Ram Sunhye Pande, v. Ka- shee Pande and others	232
Moohummud Eesan Khan, Moohummud Yar Khan, v.	292	O.	
Moohummud Ismail Jemadar, Heir of Qurar Moohummud, v. Rajah Balungee Surrun	346	Obhey Singh (Raja), the Col- lector of Goruckpore, Gop- pal Buksh, Bhugwunt Singh (pauper), v.	325
Moohummud Yahia Khan, Chowdree Dood Ray Singh, v.	332	Omar Khan, son of Alum Beg v. Aboo Moohummud Khan and others	179
Moohummud Yar Khan, v. Moohummud Eesau Khan	292	Ooduy Chund Chatoorjeea, v. Palmer & Co. on behalf of the administrator to the estate of James Morgan, esq.	14
Morris, James, v. Mr John Collis	117	Oodwunt Narain Singh (Maha- raja) Baboo Jankepershad, v.	270
Moteechund (Baboo), v. Moof- tee Ubdoolah and others	261	Oodwunt Singh (Rajah) and Rajah Jankeeram Singh, Rancee Kishlenmunee, v.	228
Moulovee Syud Ashruf Ali, v. Mirza Qasim and others	49		
Mudar Buksh and others, Qu- mur Oodeen and others, v.	216		
Mudaree Khan and others, (paupers), Ubdoo Ruhman, son of Moorad Khan, v.	403		
Muheseree (Ranee), Persaud Singh, pauper, v.	132		
Muhiudranarain and Sohawun			

	Page		Page
Ooma Baes, (widow), and Rughoonath, (grandson of Sumbhoojee Patur), the Col- lector of Benares, v.	52	Q.	
Oomaid, v. Khyrat Ali, son of Syud Ali.	258	Qadir Ali and Hidayut Ali, v. Prem Singh	250
Ooman Dut, pauper, v. Kunhya Singh	144	Qidira (Mussummaut) alias Mussummaut Usmut, v. Shah Kuberoodeen Ahmud	407
Oudan Singh and Tej Singh (a minor), through his guar- dian the above, Oudan Singh, v. Kanth Chund Pande, guar- dian of Beharee Lall (a minor) and Gopal Chund	205	Qumur Oodeen and others, v. Madar Buksh and others	216
P.		R.	
Palmer and Co. on behalf of the administrator to the estate of James Morgan, esq., (Oduy Chund Chatoorjeea, v.	14	Rai Rughoo Buns Sahai and others, Amanee Tewaree, v.	363
Pana (Mussummaut) and Ish- ree Pershad, v. Hurbuns Lall and others	177	Rai Sham Bullubh, v. Pranki- shen Ghose, guardian of Ki- shenmunnee Dasee	33
Persaud Singh, pauper, v. Ra- nee Muhesree	132	Rajchunder Das, v. Mussum- maut Dhunmunnee	361
Phool Chund, Mussummaut Bheesoo (pauper), v.	223	Rajchunder Rai, v. Ramhuree Ghosal	268
Pirthee Chund Rai, Tohfa Di- bia, v.	134	Raj Gir and Cosa Gir, the Col- lector of Benares, and Birj- ruttun Das and on his death Cawn Doss, v.	88
Pirthee Singh, v. Bisumber Sa- hee and others,	298	Rajkishen Sahoo, Mussummaut Ayabnttee (since deceased), v.	28
Pitumber Singh (Maharaja), Gopal Lal and others, v.	54	Rajkoomar Rai and others, Kirtnarain Das and others, v.	219
Pokhnarain, Mohun Lal and Sohun Lal, v. Mussummaut Seesphool (widow of Ram- dyaul).	114	Rajnaraish Das, pauper, Beer- pershad Chowdree, v.	343
Prankishen Ghose, guardian of Kishenmunnee Dasee, Rai Sham Bullubh, v.	33	Ramchund Baboo, v. Govind Das	127
Pranput Singh and Runjeet Singh, Bhowanee Singh and Ramnidh Singh, v.	284	Ramchunder Chattoorjeea, Ru- jub Ali Khan, pauper, v.	23
Prem Singh, Hidayut Ali and Qadir Ali, v.	250	Ramchurn Lal, v. Mussummaut Tejkoonwur (pauper)	337
Pudum Singh and others, Mul- lick Ahmud Khan, v.	156	Ramdhun Sein and others, v. Kishen Kanth Sein and others	100
Puhlwan Singh, Taliwur Singh, v.	301	Ramdial Singh, Raja Rughoon- undun Singh, v.	356
Pursun Rai and others, Zee- boonisa and others, v.	316	Ramgunga Manik, Ranees Soo- mitra, v.	40
Putnee Mull (Raja), v. the Col- lector of Allahabad	304	Ramhuree Ghosal, Rajchunder Rai, v.	268
		Ramjoy Chowdree, Mussum- maut Jymunee Dibia, v.	289
		Ramkishen Rai and another, v. Gopeemohun Baboo	340
		Ramkishen Surkheyl, guardian of Iswur Chund Rai, minor, adopted son of Ram Lukhee Dibia, deceased, v. Mussum- maut Srimutee Dibia	367
		Ramkoomar Burm, Ranees In-	

	Page		Page
dranee, mother and guardian of Ramnath Gurg, a minor, v.	392	laum Moortuzá, Collector of Zillah Rajshahy, v.	400
Ramkunhaee Rai and others, v.	17	Rughoonath Pathuk, manager on the part of Vishnoopershad Singh, a minor son of Bahadoor Singh and Gooroo Dut Singh, heir of Bishen Singh deceased, Murdun Singh and others, v.	239
Ramlochan Ghose, Khaja Nechoos Marcar, v.	221	Rughoonundun Singh (Raja), v. Ramdial Singh, v.	356
Rammohun Mullick, Zumeer Oodeen and Mussummaut Zeinub Banoo, v.	111	Runjeet Singh and Pranput Singh, Ramnidh Singh and Bhowanee Singh, v.	284
Ramnarain Dutt and others, v.	•	S. Sabooddhamisser, Ramsurrun, v.	4
Mussummaut Sutbunsee and others, v.	377	Sadhoo Lall and others, v.	•
Ramnarain Ghose, Munohar Lal, v.	66	Naeem Beebee and Ifayut Ahmud, v.	159
Ramnarain Mitter, v. Kaleepershad Rai and others, v.	372	Sahib Jan Khatoon, v. Dianut Beebee and others, v.	12
Ramnarain Mitter, v. Kalee Das Rai and others, v.	420	Sahibzada Singh (Baboo), Rajah Jypermash Singh, v.	51
Ramnadh Singh and Bhowanee Singh, v. Pranput Singh, v.	284	Seam Begum and others, v.	•
Ramruttun Sarma and others, Sona Ram Sarma, v.	266	Ghalib Jung Khan and others	335
Ramsona (Mussummaut) and guardian of Ramkoomar Motteelal, v. Mr. George Chester, Commercial Resident at Maladah, v.	169	Seesphool, Mussummaut (widow of Ramdial), Pokhnarain, Mohun Lal and Sohan Lal, v.	114
Ramsurrun, v. Sabooddha Misser, v.	4	Shah Kubeer Oodeen Ahmud, Mussummaut Qadira, alias Mussummaut Usmut, v.	407
Rao Ram Singh, guardian of the minor Surruwutee Dibia, and Mussummaut Lukhee Ishwuree Dibia, Gopalchurn Bural, v.	93	Sheikh Lootf Ali, Meer Sheer Ali and Rajah Sheolal Dobe, v.	63
Ratna Chundra (Baboo) and Manik Koonwuree, v. the Collector of Allahabad, v.	280	Sheodasnarain (Baboo), v. Kunwul Bas Koonwur and others	234
Rooder Chunder Chowdhry, v. Sumbhoo Chunder Chowdhry	106	Sheolal Dobe (Rajah) and Meer Sheer Ali, v. Sheikh Lootf Ali	63
Rookunee Dibia (Mussummaut), Kishnanund Chowdree and others, v.	70	Sheopershad and Bechun Lal, v. the Collector of Government Customs at Benares, v.	354
Roopchand and others, Luchmun Das and others, v.	3	Sheoram Brahmacharee, v. Subsookh Brahmacharee, v.	358
Roopchand Sahoo, Dilaram and others, sons of Kishna Ram, v.	24	Sheo Ratna Singh and others, Chundun Koonwuree, v.	275
Roshun Khatoon, v. Jan Khatoon, v.	414	Shumsheer Ali Khan, v. Mussummaut Wilayutee Begum	58
Rughoonath Das, Jugunnath and others, v.	311	Shureef Oonisa (Mussummaut), pauper, v. Mussummaut Khizur Oonisa Khanum and others, v.	210
Rughoonath Nundee and Gho-	•	Sirdha Geer and Toorunt Geer, the Collector of Goruckpore, v.	351

	Page		Page
Sohawun Lal and Muhindrana- rain, heirs of Bukhtawur Singh, <i>v.</i> Ujaib Rai	41	Tej Sing (a minor, through his guardian) and Oudan Sing, <i>v.</i> Kanth Chund Pande, guar- dian of Beharee Lall (a minor) and Gopal Chund	205
Sohun Lal, Pokhnarain and Sohun Lal, <i>v.</i> Mussummaut Seesphool (widow of Ram- dial)	114	Tohfa Dibia, <i>v.</i> Pirthee Chund Rai	134
Sonaram Sarma, <i>v.</i> Ramruttun Sarma and others	266	Taorunt Geer and Sirdha Geer, the Collector of Goruckpore, <i>v.</i>	351
Sonaton Sahoo and others, Mussummaut Phunmunnee, pauper, <i>v.</i>	30	Tubeeb Shah, <i>v.</i> Budder Oodeen U.	162
Soomitra (Ranee), <i>v.</i> Ramgunga Majik	40	Ubdoolah (Mooftee) and others, Baboo Moteechurn, <i>v.</i>	261
Srimutee Dibia (Mussummaut), Ramkishen Surkhey, guar- dian of Iswurchnad Rai, mi- nor, adopted son of Ram Lukhee Dibia, deceased, <i>v.</i> ..	367	Ubdoo Ruhman, son of Morad Khan, <i>v.</i> Mudaree Khan and others, paupers	403
Subsookh Brahmacharee, Sheo- ram Brahmacharee	358	Uchruj Lal, Bhuwanee Suhai, <i>v.</i> ..	225
Suleem Oollah and others, <i>v.</i> Doorputtee Dasee	319	Ujaib Rai, Sohawun Lal, and Muhindrana-rain, heirs of Bukhtawur Singh, <i>v.</i>	41
Sumbho Chunder Chowdhry, Rooder Chunder Chowdhry, <i>v.</i> ..	106	Ulruk Singh (Baboo), the Col- lector of Benares on the part of Government, <i>v.</i>	381
Surnam Rai and Kurta Rai, <i>v.</i> Afzul Ali	3	Ulruk Singh, <i>v.</i> Brijpal Das and others, heirs of Gokul Das, deceased	417
Sutbunsee (Mussummaut) and others, Ramnarayun Dutt and others, <i>v.</i>	377	Unnapoorah Dibia (Mussum- maut), Mussummaut Bijia Dibia, <i>v.</i>	26
Syud Shah Basit Ali, <i>v.</i> Syud Shah Imam oodeen	176	Uzeezonisa, pauper, <i>v.</i> Culub Ali Khan and others	321
Syud Shah Imam oodeen, Syud Shah Basit Ali, <i>v.</i>	176	W.	
T.		Wilayuttee Begum (Mussum- maut), Shumsher Ali Khan, <i>v.</i> ..	58
Taliwur Singh, <i>v.</i> Puhlwan Singh	301	Z.	
Taramunee Dibia (Mussum- maut), <i>v.</i> Devnarayun Rai and Bishenpersaud	387	Zeeboonisa and others, <i>v.</i> Pur- sun Rai and others	316
Taramunee (Mussummaut), Bho- wangepershad Goh, <i>v.</i>	138	Zeinub Banoo (Mussummaut) and Zumeer Oodeen, <i>v.</i> Ram- mohun Mullik	111
Tarnee Churn and Kalee Churn, sons of Parbuttee Churn Nag, paupers <i>v.</i> Mussummaut Da- see Dasee	397	Zulhooroonisa (Ranee), Rajah Deedar Hosein, <i>v.</i> .. 46 & ..	164
Tej Koonwar (Mussummaut) pauper, Ramchurn Lal, <i>v.</i> ..	337	Zumeer Oodeen and Mussum- maut Zeinub Banoo, <i>v.</i> Ram- mohun Mullik	111
		Zureenah Beebee, (Mussum- maut) <i>v.</i> Khaja Ali and others	32

CASES

IN THE

COURT OF

SUDDER DEWANNY ADĀWLUT.

GHOLAM UNBIA KHAN, Appellant,
versus
 MOCHEE LAL and others.

1820.

Jan. 6th.

THIS was an action brought by Gholam Unbia Khan against Mochee Lal and others, in the Provincial Court of Benares, to recover the sum of 30,135 rupees, 14 anas. It was set forth in the plaint that the plaintiff was in the habit, from the year 1865 B. S., of pecuniary dealings with Mochee Lal, who was managing partner of the firm of Seetul Bukhsh and Zouqee Lal, with his sons Ram Chuud and Govind Pershaud, and with Dhurrum Chand the *gomashda* of the house; that on this account there was still owing to him from the said firm the sum of 175 rupees, 3 anas, principal without interest; that in the month of September 1866 B. S., he deposited the sum of 5,000 rupees, 8 anas, in the house, at an interest of six *per cent*, after which the defendants entered into agreement with him, to the effect that whatever sums of money he might pay to their *gomashda*, Seetul Pershaud, resident at Moorshedabad, in rupees of the Moorshedabad currency, they would repay to him with interest in sicca rupees of the Benares currency, without any deduction for *hoondeawun* or other charges; that they gave him (the plaintiff) an order on Seetul Pershaud for bills on them at Benares to any amount to which he (the plaintiff) might deposit rupees at Moorshedabad; that in consequence of this agreement he caused to be paid, through the house of Seth Oondye-chund and Bishenchund the sum of 28,100 rupees, at Moorshedabad to Seetul Pershaud, who furnished him with a letter to the defendants, acknowledging the receipt of the sum in question, and containing an order on them for the repayment thereof; that the defendants entered this sum in their books as due to the plaintiff, and gave him a promissory note for the amount; but that they evaded payment on the plea that Seetul Pershaud had not remitted

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1820.

Gholam
Unbia
Khan, v.
Mochee
Lal and
others.

to them from Moorshedabad the sum which he had received from the plaintiff; that they referred him to Seetul Pershaud, entering into a written engagement to pay the sum demanded within a limited time, in the event of its not being paid by Seetul Pershaud, and that this individual having refused to pay it, on the plea that he had remitted all the plaintiff's money to Benares, and the time specified in the engagement of the defendants having expired, the plaintiff again applied to them for payment, when they ultimately refused. One of the defendants, Mochee Lal, denied having any connexion with the establishment of Seetul Pershaud at Moorshedabad, and having given the plaintiff any order on that individual. The facts of the case, as stated by this defendant, were as follow: the plaintiff brought him a letter to the purport specified in his plaint, from the house of Seetul Pershaud, but as the sum specified therein had not been remitted from Moorshedabad to the defendant's firm, he refused to pay the amount. The engagement alluded to by the defendant was indeed executed by the *gomashita* of the defendant, but the execution of it was obtained by force and fraud. This defendant stated that he was the sole managing agent of the firm which went under the name of Seetul Bukhsh and Zouqee Lal, and that the defendants had no manner of concern with the cause. The other defendants corroborated this assertion, and pleaded total ignorance of the transaction.

The First Judge of the Provincial Court passed an award against Mochee Lal, as managing partner of the firm, for the amount of the Moorshedabad transfer with interest and costs; observing, that the conditional agreement to make good that money bore date seventeen days previous to the institution of the action, during which period, the defendant would doubtless have applied to the Court for redress, had the alleged undue means been employed; that the claim was supported by a letter from the house to one Radha Kishen during the negotiation, in Mochee Lal's handwriting, as proved by the witnesses of either party; and that the plaintiff's agent at Moorshedabad would have taken a regular *hoondee* from Seetul Pershaud, instead of the receipt produced on the trial, had he, in the absence of any instructions from the Benares house to the latter, been making an ordinary remittance to his master at that place.

On appeal by the plaintiff to this Court, the First and Fourth Judges (Messrs. Fendall and Goud), were both of opinion that he was entitled to recover from the two individuals, or either of them, in whose name the business was carried on, and their heirs, as well as from Mochee Lal; Zouqee Lal and Seetul Bukhsh having been expressly declared responsible by the authenticated agreement. The decree of the Provincial Court was amended, in conformity with this judgment, and the respondents were declared liable for all costs.

LUCHMUN DAS and others, Appellants,
versus
 ROOPCHUND and others, Respondents.

1820.

Jan. 6th.

THIS was a summary appeal from the decision of the Benares Court of Appeal. It appeared that, in a summary suit between the parties for possession of Ullawulpur and other mouzas in pergunna Hadeesabad, the additional Register of Zillah Ghazeepore entered at large into the merits of the question between the parties, and decided the matter of proprietary right as if it had been formally brought forward in a regular suit; and, without any reference to the fact of previous possession, which was the only point to be determined in a summary process under regulation 49, 1793, and 6, 1813. A regular appeal being preferred from this decree to the Benares Court of Appeal by the losing party (the respondent in the appeal to the Sudder Dewanny Adawlut), that Court also entered fully into the question of right, and reversed the decision of the additional Register.

On further appeal to this Court, it clearly appeared that the question of possession was the sole point to be determined in the first instance between the litigants; the appellant maintaining that he had held possession as mortgagee of the lands in dispute since the year 1223 F. S. until the proprietor attempted to dispossess him in 1225. The Fourth Judge (W. E. Rees) before whom the case came to a hearing, was of opinion that the proceedings both of the Register who had instituted an enquiry into the question of right, and of the Provincial Court who had followed up this investigation, were irregular and contrary to the provisions of the regulations for the trial of summary suits and appeals. He further expressed his opinion that the only proper order in this stage of the case would be to direct restoration of the property to the party who was in possession before the commencement of the dispute; as justice would not be effectually attained by reversing the decision of the Provincial Court, their reversal of the Register's decree being proper, although the nature of the appeal and the grounds of the reversal were erroneous. An order to this effect was issued accordingly to the additional Register of Ghazeepore through the Benares Court of Appeal.

The proprietary right having been formally investigated and decided on, in a summary suit by a Register, whose decision, on a regular appeal having been erroneously admitted from it, was reversed by the Provincial Court; the Sudder Dewanny Adawlut on a summary appeal, did not think proper to touch the reversal, but specially directed that the party in possession before the dispute should not be disturbed.

KURTA RAI and SURNAM RAI, Appellants,
versus
 AFZUL ALI, Respondent.

1820.

Jan. 8th.

THIS was a summary appeal. The appellants stated that mouza Medneepoor, situated in pergunna Zumaneeah, was their property, and that they had made it over to the respondent, to be enjoyed by him as an usufructuary mortgage for a period of ten years from the year 1215 to 1224 F. S. inclusive, in consideration of a loan of eight hundred rupees; that on the expiration of the above period, they offered to pay the mortgagee the principal of the debt, but that

A mortgagee is entitled to recover possession of an usufructuary mortgage, on payment of

CASES IN THE SUDDER DEWANNY ADAWLUT.

1820.

the principal sum borrowed, the question as to interest being left open for future adjustment.

he would not receive it nor give up possession of the property: that they in consequence deposited the sum due in the treasury of the Zillah Court of Ghazee-pore, and petitioned the Judge of that district to cause the mortgagee to relinquish possession. The case was made over to the additional Register of the Court, who, after having duly investigated it, directed by a summary order that the estate should be made over to the possession of Isreedial and Birj Lu Singh, two individuals to whom the appellants had executed a fresh mortgage of it.

On appeal to the Benares Provincial Court the above order was reversed, on the ground that there still existed differences and disputes between the parties which required adjustment. The appellants however maintained, that, as they had deposited in Court the principal of the money borrowed, they were entitled, agreeably to the second section of regulation 1. 1798, and in conformity to the concluding paragraph of the Sudder Dewanny Adawlut's circular order, dated the 22nd of July 1813, to be restored to possession by a summary process, and that they ought not to be kept out of possession in consequence of the allegation of the respondent, that there were other sums due besides the original debt, but that on the contrary, any difference of statement between the parties, either as to the profits received or the interest due, should, agreeably to the provision contained in the second section of the regulation above quoted, be investigated and adjusted after the appellants had been put into possession.

On these grounds they appealed to the Court of Sudder Dewanny Adawlut, and on the 8th of January the case came to a hearing before the Third and Fourth Judges (W. Rees and S. T. Goad), who deeming the claim of the appellants, for the reasons assigned by them, to be just and reasonable, reversed the decree of the Provincial Court, affirming that of the additional Register; and directed that the individuals to whom the estate was subsequently mortgaged, should be immediately put into possession. (a)

1820.
an. 8th.

RAM SURRUN, Appellant,

versus

SABOODDHA MISSER, Respondent.

An order by a Zillah Judge for the execution of a private award by arbitrators is not appealable.

THIS also was a summary appeal. It appeared that the dispute between the parties had been mutually and privately referred to arbitrators for adjustment, agreeably to the provisions contained in section 3, regulation 6. 1813, and their decision was brought before the Judge within the prescribed period for the purpose of being carried into execution. The Judge accordingly gave effect to the decree, but the party against whom it was made preferred a summary appeal to the Benares Provincial Court, to set aside the

(a) Had this been an application from the mortgagee to foreclose the mortgage, instead of from the mortgagor to recover possession of his lands, the duty of the additional Register would have been purely ministerial, and he would have been required to do nothing more than to inform the mortgagor of the application for foreclosure, leaving the mortgagee to bring his suit for the mortgaged lands, after the expiration of a year from the date of the notice.—See Circular Orders of the Sudder Dewanny Adawlut, July 22d, 1813.

order of the Judge. This appeal was admitted by the Benares Provincial Court, and the Zillah Judge's order for execution, was reversed. A further appeal having been preferred to this Court, the Third and Fourth Judges (W. Rees and S. T. Goad) recorded their opinion, that for the reasons stated in the Court's circular letter, dated the 24th of February 1816, a summary appeal from an order of this nature was inadmissible, and that if the parties against whom the arbitrators had given their award were dissatisfied with the decision, they were at liberty to institute a fresh action with a view to get it set aside, agreeably to the general rules contained in regulation 4, 1793, extended to Benares by regulation 8, 1795. (a)

1820.

Ram Sur-
run, v. Sa-
broddha
Mastri.

GOVERNMENT and BAL DUT DOOBEY, Appellants,
versus
BHEECHOOK SINGH and others, Respondents.

1820.

Jan. 17th.

THIS was an action instituted by the respondents on the 18th of September 1815, in the Benares Provincial Court against the Collector of that district, together with the mortgagees and auction purchasers of the talook Khupruha in pergunnah Mundyahoo, to invalidate the public sale of that estate. The triennial assessment was stated at twenty-five thousand nine hundred and fifty rupees.

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a public
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It was set forth in the plaint, that the talook was the hereditary property of the plaintiffs; that on the occasion of its being advertised for public sale in the *Fuslee* year 1216, they went to Benares, taking with them 5,325 rupees, to find some means of making up the balance due, and that Mouluee Dilawur Ullee there persuaded them to execute a ten years mortgage of the lands for 10,000 rupees, in the name of his brothers Ullee Hoosem and Sukhawut Ullee, engaging to pay off the arrear, and receiving from them 4,325 rupees, which were to be refunded or brought to account, when, the transfer having been recorded in the Collector's office, possession should be given to the mortgagees; that after performance of these conditions, however, they could neither obtain a return of the sum in hand nor an acknowledgment for it; that the mortgagees having remained making the collections down to *By-sakh* 1217, without discharging the public revenue, and a notice of sale being issued in the month of *Jeth*, the plaintiffs came forward with the money and solicited a retransfer, but that the Collector rejected their offer, and after detaining them in custody for 23 days, sent them off to Juanpoor, where they were confined 15 days in the jail, on a charge preferred by Dilawur Ullee; that on

(a) Private awards made by arbitrators under the second clause of section 3, regulation 6, 1813, are to be received and enforced according to the rules applicable to summary process: such summary process is subsidiary to a regular suit, and cannot be set aside except on proof of corruption or partiality on the part of the arbitrators. So also if the parties had consented that the award should include a complete and final adjustment of their respective claims of right, such award, although having the full force of a regular decree, is not subject to a regular appeal, and cannot be set aside or questioned, except in the manner and on the grounds above stated.—See Circular Orders, Sudder Dewanny Adawlut, Feb. 24, 1816.

1820.

Government and
Bal Dut
Doobey, v.
Bheechook
Singh and
others.

their acquittal by the magistrate they applied for permission to pay into Court the amount due to the mortgagees, and prayed that the latter might be called to an adjustment of accounts; upon which, those persons proposed that the plaintiffs should take the talook in farm from them at an advanced rent, and pay off the mortgage on expiration of the stipulated period, to which they agreed; and paid, in the year 1218 *Fuslee*, 7,700 rupees to the servants of the mortgagees, notwithstanding which, the latter took nine villages into their own hands, and so far from paying any portion of revenue, gave in a fraudulent application to the Collector and got a *suzawul* appointed; that this officer ascertained on enquiry the payment of the sum stated by the plaintiffs, and received from them 756 rupees more, that the talook being again advertised for sale, and the mortgagees, with the *suzawul's* connivance, keeping back all payments, the plaintiffs remonstrated with the former and Dilawur Ullee, remarking that they had received 12,781 rupees in balance of the mortgage due and collections for the talook; to which the *Moulavee* answered, that he would go to Benares and take measures to save the property, and ordered them to remain at home; that they followed his directions, and that he and his two relations contrived to have their estate sold for little more than 28,000 rupees; Sheo Lall Doobey becoming the purchaser in the name of Bal Dut Doobey, and the mortgagees receiving the surplus purchase money. That their suit was grounded on the fact of the sale having been effected through collusion to the detriment of their just interests.

It was pleaded on behalf of Government, that the transfer was made at the application both of the proprietors and mortgagees, and that the sale took place regularly and unavoidably for recovery of the arrears; that a person had been deputed to take the management of the talook, and realize the amount of arrears; but that the mortgagees had not attended when called upon to explain the balances, which conduct was duly reported to the Collector, as well as the fact of their having previously levied upwards of 4,000 rupees, none of which they paid in to Government; that as neither those persons, nor the proprietors, in their then capacity of sub-tenants had cleared off the arrear before the sale, there was no other means of realizing the balance, which stood in the public accounts at 8,199 rupees without interest; that the statement of the opposite party did not go to invalidate the sale; and that the apprehension and transmission to the magistrate of the refractory proprietors, at a suit of the government pleader, had nothing to do with the case.

The auction purchaser, Bal Dut Doobey denied the existence of any understanding between himself and the other defendants.

Sukhawut Ullee and Ullee Hoossein gave in an answer, stating that the payment made by their relation Dilawur Ullee into the public treasury exceeded the stipulated mortgage money by 200 rupees; that the plaintiffs having paid in 800 rupees of their own, had received back by the Collector's orders 735 rupees, which were in excess of the arrear; that the statement of the latter as to having lodged any money with the defendants or their relation was unfounded; that they (the mortgagees) being unable

to obtain possession from the proprietors, had granted a lease of the lands to Deena Geer, a *Gosween*, who had absconded from the same cause; that the arrear from which the notification of sale was issued in 1217 was discharged by Dilawur Ullee, and had arisen from the proprietors having opposed a person deputed to make the collections; and that the plaintiffs and their relations after taking the talook in farm from the defendants had offered similar opposition to the Collector's officer in 1218, in consequence of which an arrear accumulated, and the estate was brought to sale. Lastly, that of 15,184 rupees, which had been realized by them (the defendants) as *Malgoozaree* of 1216 and 1217, *Faslee*, they had paid 14,249 rupees in government revenue, that they had been put to a charge of 5,000 rupees in collecting the above sum, and were entitled to three years interest of their mortgage money; that they had received 12,484 rupees from the surplus of the sale, but that a considerable sum was still due to them.

1820.
Government and
Bal Dut
Doobey, &
Bheechook
Singh and
others.

On the 4th of September 1815, Mr. C. Smith, Acting Judge of the Provincial Court, gave judgment in favour of the plaintiffs, making all costs payable by Government except those of the two mortgagees; the recorded grounds of his decision are in purport as follow:

I. That sale being an extreme measure from which the law professes to protect proprietors, except where it may be necessary in consequence of their own default, there should be a leaning in their favour, in considering the justice of the Collector's resort to it, and the slightest irregularity should be sufficient to render a sale void. That in this case, although the order of the Governor General (requisite to warrant sale for balances occurring within the year) did arrive before the sale, it did not arrive before the notice of sale was issued; and as by the original rules contained in regulation 6, of 1795, the Governor General in Council must appoint the place of sale, and this must be included in the advertisement or notice of sale, it followed that notice could not have been regularly issued without previous reference to Government.

II. That it did not appear that the Governor General in Council, in authorizing the sale, was influenced by any special reasons of a nature to make the case particular, as required by the eighth clause of section 23, regulation 7, 1799.

III. That under section 6, regulation 1, of 1801, the Collector was bound to sell only so much as might be sufficient to meet the outstanding balance, but he sold the whole estate, which brought 28,600 rupees, though he might have known that the value of the estate far exceeded the amount in balance.

Mr. Smith further animadverted on the Collector's conduct, as repugnant to the general spirit of the regulations, in having brought the estate to sale without allowing ample time for the proprietors to attend and explain, when the balance was to all appearance due from the mortgagees, Ullee Hoossein and Sukhawut Ullee, of whom the one was an officer of the Zillah Court, and the other held employ under the Collector himself as *tehsildar*.

By the order annulling the sale, it was directed that the Collector should return the original purchase money to Bal Dut Doobey, that person's possession of the lands being considered a fair equi-

1820. **Government and Bal Dut Doobey v. Bh echokk Singh and others.** valent for interest. Certain bond creditors of the plaintiffs, who had received 6,438 rupees of this money, by order of the Zillah Court in execution of regular decrees, were to be called upon by the same authority to refund. A similar order was issued with respect to the sum of 12,484 rupees, which had been paid to the mortgagees; and it was remarked that even had the sale stood good, the award of so large a sum under a miscellaneous order would have been disallowed.

Separate appeals were preferred by the defendants to this Court, execution of the decree being stayed at the application of the auction purchaser.

The First and Fourth Judges (J. Fendall and S. T. Goad), who sat in this cause, observed that the notice of sale was in Persian only, unaccompanied by a translation in the current language of the country (Hindee) as prescribed by section 32, regulation 6, 1795 (a); and as was indeed most essential for the information of the public in general, and the partners in the estate more especially: they also fully concurred in opinion with the Provincial Court, that the sale of the whole zemindaree for so disproportionate a balance was in contravention of regulation 1, 1801; and that the large payment made to the mortgagees under a miscellaneous order was altogether unwarranted. The decree passed by that Court as to these particulars was therefore confirmed, the respondents being declared entitled to possession of their estate on payment of the original arrear, and the mortgagees being directed to restore the sum received by them from the Collector with interest.

This Court disapproved however of the order respecting the monies which had been paid away by the Collector to the regular decree holders; being of opinion that although that officer ought to have objected at the time, on the ground that the proprietors having instituted a suit to annul the sale were not the rightful owners of the surplus, yet, that the proprietors were still bound to make up the money with interest, as their liability to the demand had been fully established. It was accordingly provided, in case of their failing to restore the monies, that the Zillah Judge should cause their property to be brought to sale by the Collector as under a regular decree. The Judge was further directed to ascertain and make over to the respondents the amount of net profits from the estate while in the hands of the auction purchaser, the money of the latter being restored to him from the public treasury.

The appellants were made liable for all costs. (b)

(a) Although this rule has been rescinded by Sec. 2, Reg. 11, 1822, yet the decree has been in substance re-enacted, by clause 2, Sec. 7, of the latter Regulation.

(b) The question whether or not the auction purchaser was entitled to interest came before the Court in a subsequent application from the Court below, and it was declared to rest on the understanding which might have taken place between him and the Collector at the time of sale; but Bal Dut Doobey was declared at liberty to make this point the subject of a separate action. One of the chief reasons which induced the decision in this case was the disproportionate quantity of property sold to the amount in arrear, but this cannot be taken as a valid objection, since the enactment of the rule contained in section 2, regulation 5, 1812, which contains this provision, "It is hereby declared, that sales made at public auction for that purpose (meaning the recovery of arrears) are not liable to be annulled by the Courts of Judicature, on the grounds that the proceeds of

AVIETICK TER STAFANOOS, Appellant,

1820.

versus

KHAJA MICHAEL ARRATOON, Respondent:

Feb. 8th.

ON the 9th of January 1817, the appellant sued the respondent in the Dacca Court of Appeal *in forma pauperis*, to recover possession of a twelve ana share of the zemindaree of Dukhun Shahbazpore, together with Roopgunge and eleven other tarooks, situated in the district of Backergunge, the triennial assessment of the whole of which lands was stated at 113,561 rupees.

The plaint was in substance as follows: Michael Sarkies died in the year 1790, A. D. leaving the lands in question together with several houses and other property in the city of Dacca. As he had no legitimate issue, Susan Beebee, the daughter of his paternal uncle, was, according to the Armenian law, entitled to one moiety of his estate, and Matroos Stafanoos, another of his paternal uncles, was entitled to the remaining moiety. In the year 1803, the aforesaid Susan made a will, in which she bequeathed her entire property to Michael Arratoon the defendant, son of the deceased Michael Sarkies, by a concubine. Afterwards, in 1807, she revoked that will, and executed another in favour of the plaintiff's wife, who was her daughter's daughter. Immediately on hearing of this circumstance the defendant brought an action in the Supreme Court against the plaintiff and his wife, with a view to set aside the posterior will, and to establish the validity of the former one. The case was tried according to the provisions of the Armenian law, conformably to which it was determined that the former will should be held to be cancelled, and that which bore the posterior date should be upheld, but as the property was not subject to the jurisdiction of the Supreme Court, Michael Arratoon was non-suited, and directed to bring his action in that jurisdiction wherein the lands might be situated. The plaintiff's wife died in the year 1814, and he being her sole heir was entitled to all the property of which she died possessed. The defendant replied by stating, that his father had no ancestral property, that he came from Persia to Bengal and settled in Dacca, where by merchandize he contrived to accumulate considerable property, both real and personal; that Kaloos, the husband of Susan Beebee, also came to Dacca, and they being in extreme distress in the famine which occurred in the Bengal year 1194, his father gave them an asylum in his house; that Khaja Matroos also came from Persia, his native country, to Dacca, and was there supported by the liberality of the defendant's father, but that no one of the individuals above named had the slightest right of participating in the property of him who supported them; that

According to the Armenian law a verbal bequest of self-acquired property to an illegitimate son is good, there being no legitimate children; but such a disposition of patrimonial property is not valid to the exclusion of the legal heirs. And on proof that such illegitimate son, after the death of his father, virtually acknowledged the right of his heirs, by taking out probate, and benefiting under the will of his great uncle, and by entering into a compromise with his great uncle's daughter for her share of the property, the Court held that the verbal bequest should not avail.

the estate have materially exceeded the amount of the arrears due from the proprietors of the land to Government." This enactment, it was contended on behalf of Government, was declaratory, and had a retrospective effect, but the plea was over-ruled. There was another appeal to the Sudder Dewanny Adawlut connected with the above case. The appeal was preferred by the mortgagees, but dismissed; it being held just that the surplus proceeds of an estate sold, having been paid to the mortgagees by a summary order of a Zillah Court, they should refund on the sale being set aside as illegal, though the mortgagees had clearly a lien on the estate, and would have been entitled to the surplus proceeds had the sale been upheld.

1820. the defendant's father, feeling the approaches of old age, took his son (the defendant) to Mr. Douglas, the judge of the city, and in his presence publicly acknowledged the defendant as his sole heir, representative, and successor, and that on his death in 1790, he was recognized as such by the public authorities, and had been in possession of the whole property ever since that period; that when the defendant took out letters of administration, in conjunction with Matroos, to recover outstanding debts due to the estate, he gave Susan Beebee as the surety for his due discharge of the trust reposed in him, which office she never would have undertaken had she possessed any right of inheritance; that the claim of the plaintiff through her was wholly unfounded, as he could have no right of inheritance, while the uncle of the proprietor survived, which person had conveyed to him (the defendant) by his last will and testament, all his right and interest in the estate; and lastly, that Susan Beebee, although in reality she had no title, had made the same disposition in his (the defendant's) favour in the year 1803, in consideration of receiving a donation to the amount of 23,600 rupees, which sum had been advanced to her by the defendant with the view of preventing the possibility of any future litigation, however groundless.

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On the 24th of July 1818, the claim of the plaintiff was dismissed by the Fourth Judge of the Dacca Court of Appeal, on the grounds that Susan Beebee had no right of succession, that the claim of the plaintiff through her was consequently groundless, that admitting her to have had the right of succession, it was not competent to her, after having made one disposition in favour of the defendant for a valuable consideration in the year 1803, to make another in favour of the plaintiff in the year 1807. An appeal having been preferred from the above decision to the Sudder Dewanny Adawlut, the Court deemed it necessary to consult the Bishop of Armenia on the law of the case, and the following question was accordingly propounded to that dignitary: "A. dies intestate, leaving B. a natural son, C. an uncle, and D. the daughter of an uncle, who was the elder brother. A. during his life time acquired the estate from his own exertions, without assistance from any hereditary property, and verbally acknowledged B. as his son and successor. To whom or in what proportions does the acquired estate of A. devolve on his demise by the Armenian law or custom?" The Bishop's reply was in the following terms: "As A. during his life time acquired the estate from his own exertions without assistance from any hereditary property, he had consequently the sole right of the disposal of his own acquisitions, freely and voluntarily as he pleased, or to constitute a representative thereto. And as you observe A. died intestate, and verbally acknowledged B. (a natural son) as his son and successor, I presume by this A. had no legitimate son. The property in this case no doubt devolves on B. the acknowledged successor of A., in preference to C. and D. The proportioned claims of an uncle, and an uncle's daughter, would have been groundless had the property been patrimonial." On the 8th of February, this cause came to a hearing before the Chief and Fourth Judges (J. Fendall and S. T. Goad) who decreed as follows; Michael Sarkies died in the year 1790, leaving the zemindaree of Dukhun Shahbazpore and other

property. There was no written will, forthcoming, and there survived him a paternal uncle named Matroos Stafanoos and Khaja Michael Arratoon, the deceased's son by a concubine. These two survivors, on the strength of their relationship, took out letters of administration from the Supreme Court. Besides the above-named persons, there was also living one Susan Beebee, daughter of the elder uncle of the deceased Michael Sarkies, which Susan was married to an Armenian named Galoos; all these individuals lived together for several years in joint possession of the property, without coming to any division; but the management of it rested exclusively with Khaja Michael Arratoon. In the year 1797, Matroos Stafanoos executed a will to the following effect; "I, Matroos Stafanoos, not being indebted to any one, nor having any demands upon any one, do make this my last will and testament. My brother's son Michael Sarkies died at Dacca in the year 1790, without having executed a will, leaving a son named Arratoon by a concubine. As the deceased in his life time acknowledged the said Arratoon to be his son, I do by these presents constitute him my executor. At the present time there are only surviving, besides the said Arratoon, of the relations of the deceased, I, Matroos, his uncle, Susan Beebee, married to Galoos, daughter of another paternal uncle, and Kamsuna the widow of my paternal uncle. On the death of Michael Sarkies, I, Matroos, and his son Arratoon, took out letters of administration from the Supreme Court, and have been in joint possession ever since, the management of the property being confided to the said Arratoon. I am entitled to a share of the estate by inheritance, and with respect to that share, whatever it may be proved to be in a court of justice, I will may be taken after my death by the grandson of my brother (the said Arratoon) whom I acknowledge to be my successor and lawful heir, in the same manner as my brother's son, Michael Sarkies, acknowledged him to be his son and heir." Probate of this will was duly obtained and has been filed in this Court. This document establishes two points; first, that Matroos, that is, the testator, Arratoon the respondent, and Susan Beebee the wife of Galoos, were heirs of the deceased Michael Sarkies, and were in joint possession of his landed and other property from the time of his death in 1790, to the time of the execution of the will in 1797; and secondly, that the respondent proved the will in the Supreme Court, and there admitted that Matroos, the testator, was entitled to one-third of the property in right of inheritance, and that he himself was the legatee of Matroos. From this it is evident that the respondent did not consider himself sole heir to his deceased father, and that he virtually recognized the right of inheritance possessed by Matroos and Susan Beebee. If the respondent was really not of this opinion, and considered himself to be entitled to the whole, it is by no means probable that he would take out probate of Matroos's will for the purpose of obtaining a third, and he would, on the decease of his father, have procured letters of administration in his own name alone, as son and heir. It has been proved, as well by documentary as by oral evidence, that the appellant was married to the daughter's daughter of Susan Beebee, the wife of Galoos. This Susan died in the year 1814. It is true that she did make a will in favour of the

1820.

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Khaja Michael Arratoon.

1820. respondent in the year 1803, received the sum of 23,600 rupees in consideration of her executing the same, but she subsequently made another in 1807, in favour of the appellant and his wife; making them successors to all the property, with the exception of a few trifling legacies. The former document was rejected by the Supreme Court, and of the latter, probate was granted in the year 1808. It appears from all these circumstances clear to the Court that Matroos and Susan were, together with Arratoon, the respondent, jointly seized of the estate left by Michael Sarkies, and that on the deaths of the two first mentioned individuals, their shares should go to the individuals named in their respective wills. By these means the respondent would be entitled to two thirds, one third in right of inheritance from his father, and to the other third agreeably to the will of Matroos. It is also clear that the appellant is entitled under the will of Susan to the other third. The sum which she received in consideration of making the former will should have been refunded by her, but no special provision is necessary on that account; as the respondent has been in exclusive possession of the estate ever since the said Susan's death, and has doubtless realized profits more than equal to the sum advanced, which may be considered an equitable set off to the claim against Susan for the money had and received by her. The decree of the Dacca Provincial Court was therefore reversed, and, of the whole property, one third was adjudged to be the right of the appellant. The costs were made payable by the parties respectively. (a)

1820.

SAHIB JAN KHATOON, Appellant,

VERSUS

Feb. 9th.

DIANUT BEEBEE, and others, Respondents.

A claim having been preferred against the widow of a Moosulmann by his sister, for half the property left by him, which was finally adjudged to be her right in lieu of dower, and twenty-one years after that decision, the same plaintiff having

THIS claim was instituted in the Dacca Court of Appeal on the 4th of August 1812, for half the estate of the late Niamut Oollah, consisting of several specified portions of land assessed and rent free in pergunna Jelalpore, with houses and other property situated in the city of Dacca and elsewhere, valued together at 8,729 rupees.

The claim set forth, that the property in question belonged to Sheikh Niamut Oollah, the half brother of the plaintiff, who died in the Bengal year 1200, leaving as his heirs the plaintiff, his cousins Sheikh Amaun Oollah and Soobhan Oollah, his female cousin Omrao Beebee, his great grandmother Zureefa Beebee, and his wife Dianut Beebee; that half the property left by that individual belonged, agreeably to the laws of inheritance, to her, the plaintiff, but that the entire property had been seized by his widow, who claimed it in right of dower, and that on the occasion of her formerly suing the defendant for possession of one moiety, to which she was entitled, she produced a deed purporting to have been exe-

(a) The decision in this case seems to have been passed not so much with reference to the principles of the Armenian law regarding succession to property, as to the fact of the virtual acknowledgment by the respondent of the rights of the individual through whom the appellant claimed.

cuted by her late husband, and settling upon her all his property real and personal in lieu of dower, on which the plaintiff's suit was dismissed. The answer of Niamut Beebee was, that the plaintiff had no title whatever to any portion of the estate left by her deceased husband, who had settled the whole of it upon her in lieu of her dower, which amounted to the sum of 5,000 gold mohurs, and 65,000 rupees: that the question had already been adjudicated, and that she possessed a final decree in her favour passed twenty years ago; and that the present claim was in opposition to section 16, regulation 3, 1793 (b). To these pleas the plaintiff rejoined that the deed of dower was a forgery, that even admitting its validity, the defendant had now enjoyed the property so long as to have realized from the profits of it double the amount of her dower, that the dower should be paid in the coin mentioned in the deed, and that as the present claim was altogether new, and not for the moiety, to which claim had been laid in the former suit, the legal provisions cited by the defendant did not apply.

1820.
brought an action against the same defendant for half of the same property, on the plea that even supposing the dower to have amounted to the sum claimed, she had realized the full amount from the profits of the estate, it was held that the claim is inadmissible.

The Officiating Judge of the Court of Appeal, after maturely weighing the pleas and evidence adduced on both sides, on the 27th of April 1815, recorded his judgment to the following purport: From the plaint filed in the former suit instituted by the claimant, which is the foundation of the present suit, it clearly appears that the whole property, real and personal, left by Niamut Oollah is not equivalent to the amount due as dower, and to the fourth share which belongs of right to the defendant as heir. * Taking the property at twenty years purchase, still it cannot be estimated at more than 125,000 rupees, which is the estimate formed by the plaintiff. Of this sum a fourth, or about 31,250 rupees is the right of the defendant as heir, and if this be added to the sum due to her on account of dower, the whole will amount to 176,250 rupees. From the decision in the former case it was sufficiently proved that the whole property left by Niamut Oollah was absorbed in the debt of dower due to the defendant, and that Niamut Oollah assigned the whole of it over to her in lieu of dower during his life time. It appears from the exposition of the law officer that a claim of dower should be satisfied before a claim of inheritance. As the defendant became seized of the lands in the manner abovementioned, and as it became her actual property, the profits which she has derived from the period of her possession cannot be carried to the account of liquidating her claim of dower. It is not necessary therefore to hear the evidence adduced as to this point. The plaintiff has stated that her present claim has no connexion with the former one, but, in point of fact, the cause of action seems to be the same in both; and at all events this plea cannot avail the plaintiff, for, taking the fact to be as stated by her, that her present claim is altogether new and unconnected with any thing that has gone before, still it ought to be dismissed, as not having been preferred for a period of upwards of twenty-one years. On these grounds he finally decreed that the claim should be dismissed with costs.

(b) This is the rule prohibiting the Zillah and City Courts from entertaining any cause, which from the production of a former decree, or the records of the Court, shall appear to have been heard and determined by any former judge.

1820. An appeal was preferred by the plaintiff to the Court of Sudder Dewanny Adawlut from the above decision, and the parties both deceased shortly after the admission of the appeal, were succeeded by their respective representatives. On the 9th of February 1820, the case having come to a hearing before the Chief and Fourth Judges (J. Fendall and S. T. Goad), they briefly expressed their opinion in support of the judgment of the Court below, which was affirmed accordingly, and the representatives of the appellant were ordered to pay the costs of appeal.

Sahib Jan
Khatoon,
v. Dianut
Beebee and
others.

1820. OODUY CHUND CHATOORJEEA, Appellant,

versus

Feb. 14th. PALMER & CO., on behalf of the Administrator to the Estate of James Morgan, Esq. Respondents.

Money lent by a judge to a native officer on his establishment held not to be legally recoverable, agreeably to the spirit of regulation 38, 1793, the borrower holding lands in other districts, though not in the district of which the lender was judge.

THIS was an action instituted by the respondents in the Calcutta Provincial Court on the 18th of February 1812, to recover with interest the sum of 8,500 rupees, as having been advanced to the appellant at Dinajpoor, by the late James Morgan, of the Honorable Company's civil service, on a bond bearing date the 21st Bhadoon of the Bengal year 1216.

The plaintiffs, by virtue of a power of attorney from the father and sole heir of the deceased, had received charge of the estate from Mr. Blackstone, Registrar of the Supreme Court, who had administered to the same by reason of the son having died intestate.

It was pleaded by Ooduy Chund in answer, that about the period alluded to Mr. Morgan, who held the situation of collector in Rungpoor, having been nominated to officiate as Judge of Dinajpoor, the defendant (who had accompanied him to the latter station as acting *Serishtadar*) applied to him for a loan, with a view to advance the money to the proprietor of a neighbouring talook on a conditional sale of the same, and that the gentleman gave him a draft, in the Bengal character, for 8,500 rupees, on Huree Narayun Baisakh, treasurer in the Collector's office at Rungpoor, mentioning "that as he still stood appointed to the Collectorship, there was a balance due to him from that person, on account of exchange on the Narayunee rupees paid into the treasury by the Raja of Kooch Behar," but that the defendant objected to receiving the money by this channel, as the treasurer, who was in expectation of the acting Collector's arrival, had evaded payment of a draft for 7,500 rupees, given to him by Mr. Morgan at Rungpoor a short time before; that his master then told him to draw up a regular bond on stamped paper for the sum he wanted, which should be paid in cash, promising to search in his *escrutoire* for the bond received by him on the former occasion, and return it, when he should be well enough to do so. That he, the defendant, prepared the required bond on the 21st of Bhadoon, and was ordered to leave it on the table, and that returning to the room soon

after, he found his master had fainted from the violence of his disorder; on which he mentioned to Doctor Halliday and Mr. Hunter, the civil surgeon and collector, who were present, that he had not been paid the money for his bond; but that those gentlemen secured the paper, and after Mr. Morgan's death forwarded it to Calcutta, together with all the other effects of the deceased: that there was in fact about 6,830 rupees due to him on a balance of accounts, and that the administrator on his demanding payment had caused him to be sued for the amount of both bonds in separate actions; in conclusion, that with reference to the appointments held by Mr. Morgan, the claim was barred by the provisions contained in section 2, regulation 38, 1793.

1820.

Oodny Chund Chatoorjeea, b. Palmer and Co. on behalf of the administrator to the estate of James Morgan, Esq.

In reply for the plaintiff, it was suggested that the other party, an experienced man of business, had framed the above answer in order to reconcile the extreme improbability of his having executed the second bond, without having received the amount of the first; his having borrowed the money on his own account, it was argued, would prevent the operation of the regulation quoted.

Judgment was given in favour of the claim, with interest and costs on the 23d of August 1815; the First Judge of the Provincial Court being of opinion that the defendant had received the amount of the bond, as he had brought it to credit in his accounts, and had acknowledged such receipt when he procured the attestation of Kunhya Surma, the only surviving witness to the bonds. Mr. Wintle rejected the evidence of a person brought forward for the defence, as having been formerly in Oodny Chund's service, and being still, there was reason to believe, under his influence.

After an appeal had been preferred to this Court, it being ascertained that Mr. Morgan senior had died in England, while the cause was pending in the Provincial Court, the usual notice for his representatives was served on Messrs. Palmer and Co., who produced a general power of attorney executed to them by Mr. F. Morgan, the next heir, at the time of his departure from India in 1812, and prayed that a final order might be passed on the case, suggesting that in the event of the previous decree being confirmed, the money might remain in deposit until the arrival from England of any further powers necessary to enable them to receive it.

The appellant having been advised, that in consequence of the death of the elder Mr. Morgan, on whose behalf the suit had been instituted, the appeal must abate; in which case Messrs. Palmer and Co. could not proceed on the judgment obtained in the Provincial Court, subsequent to his demise, had in the interim obtained the following opinion from the Advocate General, Mr. R. Spankie.

"By the death of Mr. Morgan (the father) the authority of Messrs. Palmer and Co. as his attornies, necessarily expired, and nothing can be done in prosecution of the appeal, or upon the decree till the representative of Mr. Morgan the father, or our administrator *de bonis non*, make himself a party to the proceedings."

1820.

Ooduy
Chund,
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James Mor-
gan, Esq.

The above, which was professed to be given without any particular acquaintance with the practice of the country courts, was submitted, when the cause was brought forward for decision, with an application for the Court to decline all further cognizance.

The First and Fourth Judges (Messrs. Fendall and Goad,) in consideration of the authority possessed by the respondents to defend the interests of Mr. F. Morgan, the fact of whose succession to his father's English property was not questioned, concurred, under the advanced state of the proceedings, as to the propriety of passing judgment without delay.

It appeared that the witness who had attested the bond denied any further knowledge of the transaction, and that in addition to the evidence of the person rejected by the Provincial Court, that of Dr. Halliday went to confirm the general circumstances of the case detailed by the appellant, that by the account current in which Ooduy Chund had placed the money to Mr. Morgan's credit, the latter was debited in a like amount; and that as it was clear that the appellant had been deprived of his master by death only three days after the execution of the bond, there were good grounds for belief that the money had never been received by him; that the decree passed by the Lower Court, was therefore in contravention of section 15, regulation 3, 1793, by which the Courts "are prohibited from decreeing payment of any sum due on a *tamusook* or bond, unless it shall have been proved to have been executed in the presence of two credible witnesses, or the payment of the sum demanded on the bond, or some other valuable consideration for it, having been received, shall be proved to the satisfaction of the Court."

It was further observed, that even had the above point been satisfactorily cleared up, the plaintiff would not have been entitled to recover under the spirit of the enactment pleaded by the opposite party in bar of suit, by which "the Judges and Magistrates of the Zillah and City Courts (with other judicial officers) and the Collectors of Revenue and their Assistants, are prohibited from lending money directly or indirectly to any proprietor or farmer of lands or their securities;" and all such loans are expressly declared "not recoverable in any court of judicature;" not to advert to the strong confirmation of the defendant's assertion, "that the money was to have been advanced by him to a landholder in the Dinajpore district," afforded by the confidential nature of the money dealings between the parties; for it appeared that Ooduy Chund at the time of this transaction owned lands in other districts, if not in Dinajpore, and the intention of the enactment, as stated in the preamble, was to prohibit the Company's Servants from engaging in such transactions with individuals subject to their official controul and authority.

By the final order dismissing the claim, both parties were left to pay their own costs.

RAMKUNHAEE RAI and others, Appellants,
versus
 BUNG CHUND BUNHQOJEA, Respondent.

1820.

Feb. 24th.

THIS was an action instituted in the Dacca Provincial Court, on the 17th of January 1817, for possession of a twelve ana share in pergunna Ramnuggur, the triennial assessment on which was stated to be 12,870 rupees.

The estate in dispute, originally purchased at a public sale by the father of Brij Lall and Ram Nuwaz, had been sold, the plaintiff asserted, to himself, by the sons of that person on the 28th Poos 1222, B. S., for the sum of 36,001 rupees, in evidence whereof he produced in Court the deed of sale, and an acknowledgment of his right to have his name substituted for theirs in the Collector's records, under the signature of the brothers and the seal of their step-mother Doolha Debya in token of her acquiescence; together with powers of attorney similarly authenticated, appointing agents to carry such transfer into effect on their behalf, and a separate engagement to make over to him the auction deed of sale within ten days; the land being at that time held in farm by Doollubb Sah, as agent for Ramkunhaee Rai and others, zemindars of ChundrudEEP. An unsuccessful offer of 10,000 rupees for his bargain was made to the plaintiff on their behalf, and eventually the old proprietors were induced by Ramkunhaee to prepare a deed of sale in favour of him and his partners with a prior date. He (the plaintiff) gave immediate information of what was going on to the magistrate of the city, and applied a few days afterwards to the Collector for a transfer of names; but here his claim was opposed by the sellers and Ramkunhaee, who both maintained that the latter was in possession of the property under a previous deed of conditional sale; and the Collector, in consequence, declined acting without the orders of Court. Ramkunhaee and his party on this sued the brothers for debt in zillah Backergunge, and procured an order to interdict all alienation of the lands; but the plaintiff gave in his vouchers forthwith. The other party then prepared a deed of conditional sale antedated Poos 23d, which they afterwards brought before the Zillah Judge, together with a final conveyance executed by Ram Nuwaz and Brij Lall in the interim. The Judge passed a summary order on the 18th of March 1816; leaving the plaintiff to prosecute his claim in a regular suit, which he now instituted against all the persons concerned in the transaction.

It was alleged in answer, by the defendant, Brij Lall, that the property in dispute had been actually sold on the 14th Poos 1222, to one Meerza Jafer; but that he had given place to the right of pre-emption claimed by Ramkunhaee Rai and his family, proprietors of the remaining four ana share of the pergunna, and that the sale having been negotiated with them for 35,001 rupees, 3,000 rupees were paid as earnest money on the 23d of the same month, when the usual form of engagement was delivered to them by the defendant and his brother, as also the original title deeds received by the father from the Collector; that the plaintiff, on hearing of this came to the sellers at night, and offered them an advance of 1,000 rupees on the price, over-ruling their scruples by

1820.

Ramkun-
haee, Rai
and others,
v. Bung
Chund
Bunhoojea.

assurances that they were not finally bound in the premises; that the plaintiff accordingly paid them a small sum in hand, the remainder of the purchase money amounting to 31,293 rupees being deposited in the house of Juggewun Das to await the registry of the documents, and delivery of possession; that the brothers on their part signed the papers alluded to by the plaintiff, and after the latter had caused the same to be attested, directed their own *gomashias* to take charge of them till the completion of the transaction, and receipt of the full purchase money; that when the above transaction came to the hearing of Ramkunhaee's agents, they remonstrated against it, and persuaded the defendant and his brother to recede in favour of their first engagement; but that the plaintiff refused to receive back the sum advanced to him, and obtained possession of the papers through the collusion of the servants; that after his unsuccessful application to the Collector, the brothers executed a final deed of sale to the other party on the 23d *Phagoon*; that Bung Chund Bunhoojea having failed in a petition to the Zillah Judge, had afterwards promised the defendant and his brother at Dacca, an additional sum of five thousand rupees, and thereby induced them to give in statements to the Collector, the Judge, and the Provincial Court, denying the first sale; that he also fraudulently obtained from the banking house 9,781 rupees of the money in deposit, and had appropriated it to his own use; that the defendant and his brother had in consequence applied for redress to the Provincial Court, and the Sudder Dewanny Adawlut; but that those Courts had approved the conduct of the Zillah Judge in declining all interference.

Ram Nuwaz in a separate answer confirmed only such part of the preceding account as related to the negotiation with Meerza Jafer, which this defendant maintained had been broken off in consequence of his step-mother's disapprobation; his brother and himself, he alleged, had then come to terms with the plaintiff, and having with part of the money replaced the sum advanced by the Meerza, they had executed a final sale of the estate to him, with Doolha Dehya's consent. He (Ram Nuwaz) further corroborated all the material parts of the plaint, declaring that Ramkunhaee and the others who held the estate in farm, after fruitless overtures to the plaintiff, had gained over by bribery the servants of Bij Lal and himself, as well as one Kalon, their cousin, who possessed over them considerable influence, and thereby procured their attendance at the temple of De ee in Dacca, where Ramkunhaee bound himself by oath to pay the brothers 45,000 rupees for the estate, on condition of their executing a deed with a date antecedent to that of the previous sale, and entered into an engagement to pay all expences; that the brothers had in consequence joined in opposing the plaintiff in the manner stated by him, and had signed the required paper on the 26th *Magh* 1222, B. S. He (the defendant) admitted, that a corresponding final deed of sale had been drawn up, but it had been obtained from his servants by Ramkunhaee through undue means, and the signatures of his brother and himself had been forged; that the individual alluded to had indeed contrived to induce their servants to betray their interests before no less than three distinct authorities, and latterly had persuaded the defendant's brother to give in a false account of the whole transaction.

It was further explained, that of the money received by the plaintiff from the house of Juggewun Das, on draft from the brothers, he had returned them all but a trifle, which he had retained till the draft should be surrendered to him; but the defendant on demanding that voucher from his brother, had been informed by his cousin Kaloo that it had been filed in Court, with another paper of which the defendant had no knowledge, and that from the other party (Ramkunhaee) on the contrary, no consideration whatever had been received for the sale of the zemindaree.

1820.

Ramkun-
haee Rai
and others,
v. Brij
Chund
Bunhojee.

It was pleaded on behalf of Doolha Debya that her deceased husband, She Lall Tewarree, being very infirm, had in the year 1217, B. S. divided his property (the lands in dispute), into two equal portions, of which he made over by deed one to Khooshal Chund, his son by the defendant, and the other to the first two defendants, his sons by a second wife: and retired from all worldly concerns; that his three sons acquiescing in this partition had given the estate in farm, in the month of *Kartick* 1218, B. S. for that and the five following years to Ram Doolubh Lal, on behalf of Ramkunhaee Rai and the other defendants, receiving the *malikana* in the proportion of their respective shares; that on Khooshal's death in 1219, B. S. the defendant, by reason of the father's retirement from the world, became his heir, took an acknowledgment to that effect from the farmer, and received her late son's share of the *malikana*; that Brij Lall and Ram Nuwaz had, in an application to the Collector, acknowledged the defendant's lawful possession of Khooshal Chund's estate, that she had never sold the lands to the plaintiff, nor received the purchase money; and that the two other proprietors had no authority to sell the whole to the detriment of her rights; that in the Bengal year 1222, they had attempted, in conjunction with their agent Seetul Misra, by duress to compel the defendant, who lived in the same house with them, to authenticate by her signature a deed of a sale to the plaintiff for the sum of 45,000 rupees, one half of which they promised to make over to her on completion of the conveyance: that they had also attached the defendant's seal (which was kept by the *gomashita*) to some papers, with the contents of which she was unacquainted; that the plaintiff was wrong in asserting that such deeds had been prepared with her acquiescence, that had this been the case, her signature would without doubt have accompanied her seal, and the purchase money would have been accounted for to her in presence of witnesses, without which forms the sale was invalid; and lastly, that of the alleged sale to the other defendants she knew nothing.

The defendant, Ramkunhaee Rai, together with Rutten Mala, widow of Bhurut Rai, who died while the cause was pending, gave an answer to the same purport as that of the first defendant, Brij Lall. They maintained their right of preemption as joint zemindars of the pergunna, and stated the sum for which the sale had been concluded with Mahumud Jafer at 36,000 rupees.

The remaining partners in the pergunna, Rughoonath Rai, Puddun Mala, Sham Ram Rai, and Bulram Rai, joined in the above statement.

1820.

Ramkun-
haee Rai
and others,
v. Bung
Chund
Bunhobjea.

The plaintiff in a supplementary petition, explained that the bargain for the lands was actually concluded and the papers prepared on the 16th *Poos*, on which day a payment of 2,765 rupees, as earnest money, was made to the proprietors through the house of Juggewun; that on the 24th of the same month, a further advance had taken place of 2,000 rupees; and that the deed of sale had been finally executed on the date mentioned in the plaint, but that it had been delivered to him on the 2d of the following month, when the balance of the purchase money was made over in the presence of witnesses. The above allegations were denied by Brij Lal and Ram Nuwaz, who insisted that the money had been advanced on both occasions at the usual rate of interest upon their simple bond, which they had discharged, and were ready to produce.

Ram Nuwaz subsequently retracted his original answer and joined in that of Brij Lal declaring that the former had been given in surreptitiously by his *gomashta* Hurees Chundra. The First Judge (Mr. John Ahmuty) in passing judgment on the 23d of April 1819, observed that the document purporting to bear date the 23d *Poos* 1222, had, it was evident, been prepared conclusively by the defendants; for Ram Nuwaz had examined witnesses in corroboration of his first answer previous to disclaiming it; besides which, it bore his signature, and the circumstances related in it had been satisfactorily proved on behalf of the plaintiff, by the evidence of persons who were present at the place of their occurrence; that the sale by the defendants Brij Lal and Ram Nuwaz to Bung Chund in the presence of Doolha Debya, and with her free concurrence, was well attested, and that the payment of the purchase money into the house of Juggewun and Brij Rutten Das was placed beyond all question by the evidence of the parties, and reference to the books of the concern, from which latter it appeared that the deed of sale received from Meerza Jafer had been deposited in the bank from the 17th *Poos* till the 2d *Magh*, and therefore could not possibly have been made over by the original proprietors to the other defendants on the 23d of the former month; further, that as the purchase of the twelve ana share of the pergunna by the deceased Sheo Lal Tewarree had taken place subsequently to the possession of the remainder of the estate by the other family, as no relationship existed between the parties, and the engagements for the public revenue were separate, there were no sufficient grounds for the claim of preemption. A decree was accordingly given in favour of the claim, making the defendants liable for all costs, with the exception of Doolha Debya, who was left to pay her own expences only, and declared at liberty to sue her step-sons for her proportion of the purchase money of the estate.

It appearing from the evidence of five individuals, that the rejected document had been executed by the brothers Brij Lal and Ram Nuwaz, and afterwards filed in Court by Ramkunhaee Rai, under a knowledge that it was a forgery: the whole of those persons were made over to the magistrate, in pursuance of the third clause of section 14, regulation 17, 1817, with a view to the commitment of them and their coadjutors.

Execution of the above order was stayed, on the presentment of an appeal to this Court by Ramkunhaee and Ruttun Mala, to the benefit of which the other two defendants were admitted on a subsequent application. 1807.

The First and Third Judges (J. Fendall and S. T. Goad) agreed as to the propriety of consulting the Hindoo law officers of the Court with a view to the elucidation of the legal rights of the several members of the family of the acquirer of the lands, according to the law current in Benares, of which part of the country the family of the acquirer were natives, as well as for the purpose of ascertaining whether the right of preemption on the ground of vicinage and joint ownership, claimed by the partners in the zemindari, was sanctioned by the Hindoo law current in Bengal, where the property was situated. Ramkunhaee Rai and others, v. Bung Chund Buauboojea.

By the joint answer of the pundits, Sobha Sastree and Ram Tunoo Bidyavagees, it was declared,

I. That supposing Sheo Lal to have executed the deed of partition, and to have renounced worldly concerns, nevertheless on the death of Khoosal, during his father's lifetime, that person's proper share would devolve on his half brothers, for it was not asserted that Sheo Lal had carried into effect the actual division of the lands essential to the validity of a partition. According to the *Mitakshura*, and other works of the same school, he could not indeed have duly done so, as his entire estate was not separate from that of the joint proprietors of the pergunna, and the inequality of shares was moreover contrary to the Hindoo law; that Doolha Debya's right of succession was therefore barred by the circumstances of vested joint property of the half brothers of her deceased son in his estate.

AUTHORITIES.—The *Mitakshura* : Partition (*vibhāga*). is the adjustment of divers rights to the whole by distributing them on particular portions of the aggregate.—*Colebrooke's translation of the two treatises on inheritance*, p. 243.

Yajnyavalkya, “A legal distribution made by the father among sons, with greater or lesser shares, is pronounced valid.”

Thus explained by the *Mitakshura*, “when the distribution of more or less among sons separated by an unequal partition is legal, or such as is ordained by law, then that division made by the father is completely made, and cannot be afterwards set aside, as is declared by *Munnoo* and the rest, else it fails, though made by the father.”—*Vide ibid.* 262 and 263.

II. In the ordinary case of Sheo Lal's death, leaving a widow and two sons by a former wife, the share which would have gone to a son of the deceased by the surviving wife, who died before his father, will be inherited, not by the mother, but by his two half brothers.

III. When a person sells lands, which previously, by purchase, one of the legal modes of acquisition, has become subject to him in property, defined to be the right of discretionary disposal by gift or sale, his interest in the article sold is by the act of sale transferred to the new purchaser; the circumstance of possession being withheld by the former will not bar the right of the latter over property which has been to him transferred by a like legal form, still less

1807.

Ramkun-
baee Rai
and others,
v. Bung
Chund
Bunhoojee.

can such withholding of possession on the part of a neighbour or joint proprietor whose property is intermixed with that sold. The pundits continued, that the gift or sale of a portion of hereditary property, held in common with brothers or other sharers, by the owner, is without their consent irrevocably valid, and has been maintained by all Bengal writers, ancient and modern, who contend for the doctrine of partial rights (a), from which is to be inferred the validity of a sale of lands acquired by purchase, without the consent of neighbours or joint shareholders; since, according to them, nothing more than the infraction of a receipt is incurred by a person through the forbidden sale or gift of his joint property.

The prohibition in the *Maha Nirbana Tantra*, of a sale of immoveable property without the consent of kinsmen, friends, and persons of the same cast, being at variance with the above doctrine, is not approved by any of the Bengal writers; they indeed hold that a thing forbidden, if done, cannot be cancelled.

The above was declared to be a true exposition of the law, as contained in the *Daya Bhaga*, *Daya Tutwa*, *Daya Krama Sengruha* (*Sreekrishna's* commentary on the *Daya Bhaga*), the *Viruda Bhungarnuva* (or code translated by Mr. Colebrooke), and other works current in Bengal.

AUTHORITIES.—*Narada*, cited in the *Daya Bhaga* and other works. “*When there are many persons sprung from one man, who have duties apart and transactions apart, and are separate in business and character, if they be not accordant in affairs (b), should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth.*”—*Sreekrishna* in his commentary on the *Daya Bhaga*.

“In like manner gift or sale by the proprietor of land, whether separate or held in common, is legal from the possibility of distinguishing it by casting lots.”—This argument in the *Daya Bhaga*.

“For it is impossible to change the nature of a fact even by a thousand texts.”(c)

The substantial correctness of the order passed by the Provincial Court being thus established, a final order was passed confirming that judgment in all its provisions, and dismissing the appeal with full costs.

(a) In support of this exposition of the law, it was to be observed of the works cited, that the *Daya Tutwa* of *Ragoonundana* expressly oppugns the doctrine of partial rights, although the author afterwards, with some appearance of inconsistency, asserts the right of a coparcener to sell his own share of an undivided family estate. On this latter point there is indeed no difference of opinion among Bengal writers. For more detailed information on the subject, see note at the bottom of pages 5 and 6 of Mr. Colebrooke's translation of the *Daya Bhaga*.

(b) The words in italics, although found in the original, and necessary to shew the scope of the rule, have been omitted by the pundits in their *vyavastha*.

(c) This maxim, if acted upon to its full extent, is calculated to involve the Hindoo system in much uncertainty, but it ought to be borne in mind, that the admission of it is confined to Bengal Proper, and that it is nothing more than an argument advanced by *Jimuta Vahana* in support of his own doctrine; not a quotation from the holy legislators, nor in the sense in which *Jimuta Vahana* uses it, is it maintainable under any of those authorities.

RUJUB ALI KHAN, Pauper, Appellant,
versus
 RAMCHUNDER CHUTOORJEA, (Guardian of Fyz Ali Khan),
 Respondent.

1820.

April 10th.

THIS was an action instituted on the 10th of February 1808, in the Zillah Court of Mymensing, by Beebee Ali Jan, against Fyz Ali Khan, to obtain one moiety of certain landed property in the pergunna of Alteah, &c. the proceeds of which were stated to be 14,000 rupees. It was set forth in the plaint, that Alif Khan, the plaintiff's husband, who had an estate in the above pergunna, died, leaving no children by his wife Luteefa Khanum, two by herself, viz. Coorban Ali Khan and Rujub Ali Khan; and the defendant by a slave named Rumzan. Her husband's estate, which during his lifetime was under the management of the Court of Wards, was let in farm to one Sheopershaud Das, in the year 1810 B. S., but the transfer had not been entered in the Collector's office in the name of his heirs Coorban Ali Khan dying while under age, in the month of *Bysakh* 1214, B. S., Rujub Ali Khan, who was under her guardianship, and a minor, was by law entitled to the share in question. The defendant, however, her husband's eldest son, had received and expended the whole profits of the estate, and had applied to the Collector to have his own name registered as sole proprietor. These were the grounds of the action.

According to the Moo-humudan law, the declaration of a person of unsound mind is insufficient to establish parentage, or even of one of sound mind; where the parentage is claimed by another.

The defendant in reply stated, that in the year 1194 B. S., his mother bought the plaintiff, who was called Polee, from her mother Sona, a widow, and kept her in her service, under the name of Shamkuanwar; that in the year 1199 B. S., she gave her in marriage to Sheikh Gunjah, by whom she had two sons, Coorban Ali, and Rujub Ali, of whom the former died in his service in the year 1214 B. S.; that the plaintiff's name was not Beebee Ali Jan, as she affirmed, and that Gunjah, of whom she was the wife, and her children the offspring, was still alive; that his father had been in a state of mental derangement from the year 1197 B. S.; that in the year 1210 B. S., after his father's death, when a proclamation was issued for the appearance of his heirs, the Collector having investigated his (defendant's) right of succession, and received confirmation of it, his name and that of his mother were entered as proprietors at the office of the Collector. That if the plaintiff and her son had possessed any right to the zemindaree in question, she had time to lay claim to it between the proclamation on his father's death and the period of his (defendant's) receiving possession; but that as she did not do so, the present claim was unavailing.

According to the 13th regulation of 1808, the case was transferred to the Provincial Court of Dacca, and the Third Judge of that Court passed a decree on the 15th of June 1815, declaring the marriage of the plaintiff with Gunjah, a *syce*, to have been proved: His opinion was to this effect; that it had not been confirmed by the evidence, that Rujub Ali Khan was the son of Alif Khan, or that the plaintiff entered the service of Alif Khan, after having been divorced from Gunjah; that the testimony of the witnesses, who had spoken to Rujub Ali Khan's being the son of Alif Khan

1820. rested only on the fact of their having heard him say so : but that no weight could be attached to the assertions of Alif Khan, since he was insane at the birth of Rujub Ali Khan ; that the testimony of other witnesses had been contradictory, and that moreover Gunjah in his evidence asserted that the plaintiff was his wife, and Rujub Ali Khan his son. The suit was therefore dismissed, and the costs made payable from whatever property the plaintiff possessed.

Rujub Ali
Khan, v.
Ramchun-
der Chā-
toorjea.

The plaintiff preferred a petition, as a pauper, to this Court, against the above decision, and an appeal was granted on the 18th of March 1816. Ramchunder Chatoorjea appeared as guardian on behalf of Fyz Ali Khan, the respondent, who was under age, and the original plaintiff being dead, the present appellant having shewn that he was a minor, appeared by his *vakeels*. The cause came to a hearing before the Officiating Judge (Mr. C. Smith) on the 10th of April 1820, who recorded his opinion that it had been clearly proved, that before the admission of Beebee Ali Jan into the house of Alif Khan she had been married to the Syce Gunjah ; that their divorce had not been established by evidence ; that no weight could be attached to the assertions of Alif Khan, as he was insane, and his mental derangement had been mentioned in a former decree on the cause of Fyz Ali Khan, appellant, and Zubur Dust Khatoon, respondent ; and that even had he not been insane, his assertions would not have been sufficient, as the plaintiff had been previously married, as her husband was alive, and as no divorce between them had been proved ; and that if a person's word were sufficient to prove paternity, the rule would be applicable to the Syce Gunjah, who had affirmed on oath, in the Dacca Provincial Court, that Coorban Ali Khan, and Rujub Ali Khan, were his sons. He therefore saw no reason for altering the decree of the Provincial Court, dated 15th of June 1815 : which was in consequence affirmed, the whole costs of both Courts being made payable by the appellant in the event of assets being discovered. (a)

1820. DILARAM and others, (Sons of KISHNA RAM), Appellants,
versus
April 18th, ROOPCHUND SAHOO, Respondent.

The Court of Sudder Dewanny Adawlut will dismiss a claim to lands, the purchase of which is avowed to have been in the name of another, though with claimant's money; but there be nothing manifestly to repel the presumption. Here, however, there was sufficient for that purpose, independently of the disordered state of the intellects of the declaring party, the first husband of the woman whom he claimed as his wife and the mother of his children, being alive, and no divorce having taken place between her and such first husband, who also claimed the parentage of her children.

THE respondent brought this action against Kishna Ram, on the 17th of January 1814, in the Provincial Court of Patna, to obtain possession of a certain estate called Dhurunpoor in the pergunna of Suresa, yielding an annual income of 1,200 rupees.

The plaint set forth, that the estate in question was the property of one Domun Sing and others, and was sold by the Collector by public auction, on the 25th of November 1811, in consequence of arrears of revenue, and purchased for the sum of 4,301 rupees, by permission and on behalf of the plaintiff, by the defendant, he having been his dewan for 20 years, and having been

(a) It is a well known rule of Moohuminudan law, that a declaration by a person of his being the father of such a child, is sufficient to establish the fact, provided there be nothing manifestly to repel the presumption. Here, however, there was sufficient for that purpose, independently of the disordered state of the intellects of the declaring party, the first husband of the woman whom he claimed as his wife and the mother of his children, being alive, and no divorce having taken place between her and such first husband, who also claimed the parentage of her children.

authorized by him to buy lands which were put up to sale; that the defendant paid as earnest money into the Collector's treasury, the sum of 1,000 rupees, which he had in his hands belonging to the plaintiff, and wrote to him (the plaintiff) informing him of the purchase and asking for the remainder of the money; that accordingly the plaintiff sent him two treasury bills for 2,000 rupees and 301 rupees in cash, on the 18th *Aghun* 1219, F. S. through Burkhoodar Khan and others; that the defendant returned one of the English notes, stating that the Collector refused it, upon which the plaintiff sent him 1,000 rupees cash by the hands of Ruttun Sing, Bulwan Sing and others; that the defendant out of this sum, paid on the 20th *Aghun* 1219, F. S. 3,301 rupees into the Collector's treasury, as the remainder of the purchase money, and 1,000 rupees in discharge of the revenue of the plaintiff's other lands, that the defendant obtained the title deeds and an order for possession from the Collector, the plaintiff having confidentially entrusted the possession to him; that towards the end of last year when the plaintiff called upon the defendant to give up his accounts, he concealed himself, in consequence of which another person was sent by the plaintiff to take charge of the lands; that the defendant colluding with Rowshun Lall Putwaree, preferred a complaint against the plaintiff's *Omlah* to the Magistrate of the Zillah of Tinhoot, and stating himself to be the actual purchaser of the lands in dispute, produced the title deeds of sale, upon which the Magistrate referred the plaintiff to a civil suit.

1820.
Dilaram
and others,
v. Khot-
chand Sa-
hoo.

The defendant in reply, affirmed that the plaintiff's claim was false, that he had bought the estate in dispute for himself with his own money, and that he was in possession of it and the title deeds.

On the 14th February 1806, the Fourth Judge of the above Court, having considered the statements of both parties, and the evidence produced by them in proof of their respective allegations, recorded his opinion, that the defendant had, by order of the plaintiff, purchased in his own name the lands in dispute for and on behalf of the plaintiff. He therefore passed a decree in favour of the plaintiff, ordering the defendant to restore possession of the above lands, and to give up the title deeds, directing the plaintiff's name to be registered in the Collector's office as purchaser thereof, and making all costs payable by the defendant.

The defendant having appealed against the above decision to the Court of Sudder Dewanny Adawlut, and having died shortly afterwards, was succeeded by his sons, the present appellants.

The case came to a hearing on the 18th of April 1820, when the Court (present the Chief Judge J. Fendall, and Fourth Judge S. T. Goad) reversed the decree of the Provincial Court, on the authority of the decision in the cause of Ram Manik Modee *versus* Jynarain Roy, and in consequence of the lands in dispute having been purchased contrary to the provisions of regulation 7, of 1799, section 29; and it was held that, under these circumstances, even if the respondent's right were fully established, possession could not be awarded to him. He was therefore ordered to restore the lands, if they had come into his hands in consequence of the decree of the Provincial Court, as well as the proceeds of them while in his possession, and to pay all the costs of suit. He was at the same

time informed, that he was at liberty to institute a fresh suit to recover the purchase money from the appellant, as money had and received by him without consideration.

1830.

MUSSUMMAUT BIJIA DIBIA, Appellant,

versus

April 19th. MUSSUMMAUT UNNAPCORAH DIBIA, Respondent.

According to the Hindoo law property inherited by a daughter goes at her death to her son or grandson, to the exclusion of her sister and sister's son.

THE appellant instituted this suit in the Zillah Court of Rungpore on the 25th of April 1812, against the respondent, to recover possession of half a talook called Bugoolah, Garee in the above zillah: the suit was laid at 700 rupees annual produce.

The plaint set forth, that a two ana share of a zemindaree in the pergunna of Junason in the district of Rajeshahiye and other estates in different districts, were the hereditary property of the plaintiff's late father Kishen Kanth Rai, who died leaving two daughters, viz. the plaintiff, who had a husband and sons alive, and her sister Gunga Dibia, who had a son called Bhyroo Churn; that according to the decree of the Sudder Dewanny Adawlut in a former suit regarding the Junason estate, Kishun Kanth Rai's property in that pergunna was equally divided between his two daughters; and, in consequence of the above decision, the same arrangement was made with respect to Bugoolah Garee by a decree of the Moorshedabad Provincial Court; that the plaintiff's sister's son dying in 1211 B. S., during the lifetime of his mother, before the decree of the Sudder Dewanny Adawlut was passed, and his mother also dying in 1216 B. S., the plaintiff and her son Anund Chund Surma were entitled, according to the Hindoo law, to her sister's share of her late father's property, and that Bhyroo Churn (her sister's son) his widow (the present defendant) or his son, had no claim to it; that, notwithstanding this, the defendant had taken possession of the moiety of the estate, the recovery of which share was the object of the present suit.

The defendant stated in reply, that the plaintiff's father died leaving his widow Tarnee Dibia, and two daughters, the plaintiff and her (defendant's) mother-in-law Gunga Dibia; that on the death of Kaleekanth Surma, her adopted son, without issue, Tarnee Dibia took possession herself of her husband's property, and subsequently transferred it by deed of gift to her grandson Kalee Bhyroo (defendant's husband) and caused his name to be entered in the Collector's books as proprietor; that he (Kalee Bhyroo) and his mother remained in possession for twelve years during the lifetime of Tarnee Dibia, and although the plaintiff after the birth of her son Anund Chund Surma sued her (defendant's) husband for a share of her father's property, her claim was not allowed by the Zillah and Provincial Courts; that on the birth of her (defendant's) son Rooder Churn Roy, in 1209 B. S., and on the death of Tarnee Dibia in 1210 B. S., the plaintiff presented a petition for a special appeal to the Sudder Dewanny Adawlut; that half of the share in pergunna Junason was granted to the plaintiff, who also obtained in 1216 B. S., in consequence of the above decision, a moiety of the estate now in dispute;

that the suit ought to be dismissed, inasmuch as the plaintiff had made a claim which was contrary to the Hindoo law, while the defendant and her son, who were the undoubted heirs of her (defendant's) mother-in-law, were alive. and that if her (defendant's) husband and son, who were the grandson and great grandson of Kishen Kanth Roy, were not entitled to his property, neither could the plaintiff or her son have any right to it. On the 24th of September 1812, the Zillah Judge dismissed the suit with costs, in consequence of having received a *vyavastha* from the pundits, which stated that the son performed the funeral obsequies, and consequently that the son and, on his death, the grandson of the daughter, were entitled to the property derived by her from her father, but that the sister of the daughter and her son had no claim thereto.

1820.

Mussum-
mant Bijia
Dibia, v.
Mussum-
mant, Un-
napoorah
Dibia.

The plaintiff appealed to the Moorshedabad Provincial Court, and on the 15th of May 1815, the Third Judge affirmed the decree of the Zillah Court for the reasons therein contained, and dismissed the appeal with costs.

A petition for a special appeal was presented to this Court, which was granted, it being stated in the *vyavastha* of the pundits, delivered in answer to a question from the Court, "that if the son of a younger daughter, in consequence of a deed of gift from his grandmother, obtain possession of the property which she had derived from her husband, and if the elder daughter having claim in Court to her share of her father's property invalidate the above deed of gift, and obtain a decree (the donee having died pending the suit) dividing the property equally between herself and her sister, and if, after this, the younger daughter die, the elder daughter, if alive and having a son, will be entitled to her sister's share of their father's property; but the widow and son of her deceased son have no right thereto, inasmuch as he died during the lifetime of his mother, before the decree was passed, and without having proved his right to the share of his grandfather's property, obtained by his mother." The case came to a hearing before the Officiating Judge (C. Smith) on the 19th of April 1820, who gave judgment to the following effect; that the deed of gift from Tarnee Dibia to Kalee Bhyroo, dated 21st *Bysakh* 1199 B. S., had been fully proved on the trial relative to the estate of Junason by the admissions of Tarnee Dibia the donor, and the parties themselves, as well as by the testimony of witnesses. And in consequence of it, it appeared, Kalee Bhyroo had obtained possession of the whole of his grandfather's property. The only doubt was with respect to the legality of the above document; and from the circumstance of Bijia Dibia suing Kalee Bhyroo alone, although Gunga Dibia was alive, and from no objection being made to the deed of gift, or to Kalee Bhyroo's taking possession of the property, by Gunga Dibia, it appears that she was satisfied with it; and if Bijia Dibia had also consented to it, the deed of gift would not have been made void by the Sudder Dewanny Adawlut; for the pundits of this Court declared that a deed of the nature in question was illegal only when made without the permission and consent of the heirs; but it does not appear that it is invalid with respect to the share of any heir who has consented to it. He ob-

1820.

Mussum-
maut Bijia
Dibia, v.
Mussum-
maut Un-
nāpoorah
Dibia.

served that Bijia Dibia did not appear to have been dissatisfied with the disposal made by the deed of one half of the property, and only complained that one half of it belonging to herself, and the other to her sister, the whole should have been given to Kalee Bhyroo; that the Court had only now to decide on the half in dispute, which was not included in the former claim; that from the documents of the present, as well as the former suit, it was plain that Gunga Dibia was never in possession of the share in dispute; but Kalee Bhyroo, in whose favour the deed was made, and on his death Unnāpoorah his wife, and Roodur Churn his son; that Tarnee Dibia clearly had the power of disposing of one half of the property, which had never been opposed by Bijia Dibia or Gunga Dibia during the lifetime of Kalee Bhyroo, who was alive, and in possession for twenty one years from the date of the above deed; and that the former decree of the Sudder Dewanny Adawlut did not affect the present claim. He therefore affirmed the Zillah and Provincial Courts decrees, dismissing the appeal with costs, on the grounds that the deed of gift was valid with respect to one half of the property, and had been allowed by the former decree, and that it was evidently the intention of the law that an equal share of the property should be enjoyed by the family of each daughter. (a)

1820.

MUSSUMMAUT AYABUTEE, (since deceased,) Appellant,
versus

April 25th.

RAJKISHEN SAHOO and others, Respondents.

The widow of a son who died before his father, is not entitled to inherit the father's estate according to the Hindoo law, and 12 years is allowed for the re-appearance of a missing person, after which his death will be presumed.

THIS was a suit instituted by Mussummaut Ayabutee, in the Zillah Court of Backergunge, 16th of May 1807, against Huree Kishen Sahoo, Monohur Das Sahoo, Rummakanth Sahoo and Rammakanth Sahoo, to recover possession of a fifth share of four talooks in pergunnas of Suleemabad and Beejynugger. The suit was laid at 267 rupees, 12 anas, and 16 gundas annual produce.

The plaintiff set forth, that Jykishen Sahoo (plaintiff's husband) and defendants were five own brothers, who while living and trading together, cultivated through the agency of Jykishen Sahoo, and enjoyed possession of certain lands in coparcenary; that in consequence of a quarrel between the plaintiff's husband and Lakhinarrain Roy, a zemindar of pergunna Suleemabad, the former went to Jessore in 1197, B. S., and must have died there, as no tidings were ever heard of him afterwards; that the plaintiff continued to live in a state of union, and in joint enjoyment of the property with her husband's brothers, till 1204 B. S., when they separated, and that the plaintiff was legally entitled, in her husband's right, to a fifth of all the property acquired while he and his brothers were living united.

The defendants in reply denied the plaintiff's claim, and stated

(a) The *ryasmtha* of the pundits of the Sudder Dewanny Adawlut proceeded on the supposition that the right of Bhyroo Churn, the husband of the respondent, had never been established, he having died previously to the passing of the decree, which recognized the right of his mother to one half of the estate, but the present decree was founded on the fact that the deed of gift in his favour was valid, as far as one moiety of the estate was concerned, the appellant never having objected to its taking effect for that portion.

that their father Bijyam, out of the profits of his trade, purchased for himself and enjoyed possession of the talooks, under the substituted names of his sons; that in consequence of the death of the plaintiff's husband during their father's lifetime, and a disagreement between the four brothers, their father, in 1198 B. S. divided his property by deed, giving a five and a half ana share to the defendant, Huree Kishen Sahoo, his eldest son; a four ana share to Monohur Das; a three ana share to Ramkanth, and a three ana, ten gunda, share to Rummakanth, and died in 1200 B. S.; that by this deed a provision was made for the maintenance of the plaintiff: their father having given her whatever jewels and ornaments she had in her possession, and received from her an agreement, consenting to receive thirty-six rupees *per annum* for maintenance, and relinquishing all claims on the lands; that as this sum had been regularly paid to her up to the year 1214 B. S. her claim was at once repugnant to justice, to the regulations, and to her own undertaking; and that, moreover, the suit ought to be dismissed, inasmuch as the plaintiff had no right to the property in dispute, her husband having died during their father's lifetime.

1820.

Mussum-
maut Aya-
butee, v.
Rajkishen
Sahoo and
others.

On the 1st of August 1810, the Zillah Judge recorded his opinion, that from the evidence adduced, it appeared that the lands in dispute were acquired while Jykishen and the defendants were living united, and during the lifetime of their father; that the plaintiff's husband enjoyed possession in coparcenary with the defendants, until he went in 1197 B. S. to Jessore, after which he had never been heard of; that from that time the plaintiff continued to live with the defendants until 1204 B. S. when they separated; that the funeral obsequies of the plaintiff's husband took place after a lapse of twelve years from the date of his disappearance; that the plaintiff's father-in-law died in 1200 B. S., and that the defendants had been unable to produce the deed of partition or agreement mentioned by them. He therefore passed a decree with costs in favor of the plaintiff, awarding to her a fifth share of the landed property, on the ground that the plaintiff's father-in-law having died before Jykishen's funeral obsequies were performed, the plaintiff was entitled, in her husband's right, to a fifth of the property acquired while he and the defendants were living as an united family.

The defendants appealed to the Dacca Provincial Court. Huree Kishen Sahoo, one of the appellants, was succeeded on his death by his sons Rajkishen Sahoo and Nubkishen Sahoo, and on the death of the original plaintiff, Mussummaut Ayabutee, Bangsee Sahoo, her grandson, became her representative. On the 28th of June 1815, the First Judge, with whom the Third Judge concurred, stated, that it appeared from the answer of the pundit to a question of the Court, that in consequence of Jykishen Sahoo being missing during the lifetime of his father, he, and consequently his wife or grandson had no claim to the property acquired by Bijyam; and that it also appeared from the testimony of the respondent's witnesses, that the landed property in dispute had been acquired by Bijyam exclusively. The decree of the Zillah Judge was therefore reversed, and costs made payable by the respondent, who was ordered to restore possession of the share in dispute with means profits while enjoyed by him.

1820.

Mussum-
maut Aya-
butee, vs
Rajkishen
Sahoo and
others.

The present appellant presented a petition for a special appeal to this Court, which was granted in consequence of the *vyavastha* of the pundits, in answer to a question of the Court, stating, that if a man is missing during the lifetime of his father, the Hindoo law allows 12 years for his reappearance; that if 3 or 4 years after his disappearance his father dies, his wife is not immediately entitled to share in the property of his father, the wife of the son not being mentioned in any of the treatises on inheritance as heir to the property of her father-in-law: but that after a lapse of 12 years, if no tidings be heard of her husband, and if there be no son, grandson, or great grandson, she may claim her husband's share of his father's property. The cause came to a hearing on the 13th of April 1820, when the deed of partition alluded to in the Court below, and the other documents and pleadings of the parties in the case having been read, it was referred to the pundits for their opinion, who stated, that in the present case the wife and grandson of Jykishen had no right to any thing but the sum fixed for maintenance, the will of the owner being all that is necessary in cases of self acquired property, and that a division made of such property, by the owner, who is not a minor, and is of sound mind, cannot be disturbed. The Court therefore saw no good reason for altering the decree of the Provincial Court, which was accordingly affirmed and the appeal dismissed with costs. (a)

1820.

MUSSUMMAUT DHUNMUNNEE, (a pauper), Appellant,

versus

May 3d.

SONATUN SAHOO and others, Respondents.

The right of a Hindoo widow is not necessarily forfeited by her omitting to apply for separate possession of her husband's undivided share for more than twelve years after his death.

THE appellant instituted this suit as a pauper against Sonatun Sahoo and others, in the Dacca Provincial Court, to recover 12,000 rupees, the amount of her husband's share of money and valuables.

The plaint set forth, that on the death of Huttoo Sahoo and Nilaram Sahoo (plaintiff's father-in-law) who were own brothers, and who lived and traded together, their sons continued undivided, and had joint dealings; subsequently Deedar Sookh and Nem Sookh (Huttoo's two sons) separated themselves from the plaintiff's husband and his five brothers, to whom they left a ten ana share, and took a six ana portion for themselves; that the plaintiff's husband and his brother's share amounted in value to 72,000 rupees, and that they continued to live and trade together; that the plaintiff's husband and Seekhur Sahoo, one of his brothers, died in 1204 B. S. and the plaintiff remained in joint enjoyment of the property with the surviving brothers till 1210 B. S., when they set aside the share of Seekhur's widow, took a deed of release from her, without making any communication on the subject to the plaintiff, to whom

(a) Although the decision in the case turned on a matter of fact, rather than on a point of law, yet it may be observed, as a rule of Hindoo law, that a missing person shall not be considered dead until the period of twelve years shall have elapsed from the date of his disappearance. In this case, as the father of the plaintiff's husband died before his son's death could be presumed, his son, that is, the plaintiff's husband, must have been considered entitled to inherit, and through him the plaintiff, had there been no special agreement to obstruct the ordinary course of succession.

they refused to give her husband's portion, and entered the property in their own names; that therefore the plaintiff sued for one sixth of the joint property, to which she was entitled in her husband's right.

The defendants, Sonatun Sahoo and Tilokchand, stated in reply, that plaintiff's husband, Gorachund Sahoo, was their younger brother, and a child, and had never earned any thing; that they, the defendants, gave him in marriage when 16 years of age, at an expence of 800 rupees, and that he died a minor in the month of *Sawun* of the same year, since which event they had supported his widow; and expended nearly 1,000 rupees on her account; that in 1198 B. S. Gopeenath Sirdar, the plaintiff's brother, was appointed arbitrator, and divided the estate between Huttoo's sons and the defendants, and their brothers, in ten and six ana shares; that the ten ana share obtained by defendants and their brothers was worth only 16,832 rupees, and not 72,000 rupees, as represented by the plaintiff, and that the six ana portion allotted to Huttoo's sons, was worth 10,092 rupees; that the deed of partition was forthcoming, and that as the plaintiff had made no opposition at the time of the division, her present claim was contrary to the regulation, inasmuch as it had not been prepared till after a lapse of 18 years from the date of the partition.

The reply of the other defendants was nearly to the same effect.

The plaintiff in a supplemental petition mentioned that her husband did not die in 1204 B. S. as had been erroneously stated by her, but in 1197 B. S., the year in which the partition was commenced.

On the 26th of January 1816, the First Judge dismissed the suit with costs, on the grounds of a lapse of more than 12 years from the death of plaintiff's husband to the date of the present action.

The plaintiff appealed as a pauper to this Court, and the defendants Tilokchand, Srikishen and Chedam Sahoo were succeeded on their death by their heirs, viz. Mussummaut Jyah, mother of Chedam, Mussummaut Jussoda, widow of Tilokchand, and Rasmonee, widow of Srikishen Sahoo. The cause came to a hearing before Messrs. Fendall and Goad, the First and Fourth Judges, (when the vouchers and pleadings of the parties having been examined,) the case was referred to the pundits for their opinion; and it appeared from the *vyuvustha* delivered in answer to the questions proposed, that Mussummaut Dhunmunnee was entitled to her husband's share of the property, as, by the *Shasters*, the widow succeeds to her husband's portion even of undivided property: that if such share had been withheld from her, and employed in trade, she had a right to half the profits of it, and that as Huttoo Sahoo and Nilaram Sahoo each had an eight ana share, their sons were entitled to succeed to their shares respectively, and therefore Mussummaut Dhunmunnee was entitled in her husband's right to one sixth of Nilaram's eight ana share.

The Provincial Court's decree was therefore reversed, in consequence of the above *vyuvustha*, and the sum of 1,644 rupees, (being about a sixth, making deductions for what she had already received) was awarded to the appellant with interest at the rate of eight *per cent* from the date of the suit to the date of the decree, total 2,667 rupees.

1820.

Mussum-
maut
Dhunmun-
nee, v. So-
natun Sa-
hoo and
others.

1820.

MUSSUMMAUT ZURÉENAH BEEBEE, Appellant,

versus

May 9th.

KHAJAH ALI and others, Respondents.

Claim, by a Moosulmann woman to a share of her deceased father's property, dismissed as not having been preferred for more than 12 years after his death.

THIS was a claim to recover possession of a three ana share of certain rent free lands in pergunna Serai; ten times the annual produce was calculated at 6,041 rupees. The plaint was filed on the 23d of May 1810, in the Dacca Provincial Court.

The plaint set forth, that Dewan Futteh Ali, the plaintiff's father, to whom the whole of the above property belonged, died, leaving three daughters, viz. Razia Beebee, Mudeena Beebee, and the plaintiff, Zureenah Beebee; two sons, viz. Khajah Ali and Shabaz Ali, and Bechun Beebee, his widow. The two sons succeeded him and obtained possession of the property. Shabaz Ali died in 1197 B. S.; leaving his widow Akeekoonissa, who afterwards married Khajah Ali, her husband's brother; Bechun Beebee died in 1200 B. S., Razia Beebee also died leaving a son named Abdool Ali, and a daughter named Beebun; Mudeenah Beebee died leaving a son named Alladad Khan; Khajah Ali was in possession of the whole zemindaree for ten years, and gave it in dower to his wives; but the plaintiff being entitled by law to the share now claimed of her father's property, she sued and hoped for redress.

The defendant, Akeekoonissa, stated in reply, that Futteh Ali died upwards of 30 years ago, after which Khajah Ali and Shabaz Ali managed the estate jointly for a year or two; but in 1193 B. S. a quarrel ensued between them, and the latter sued the former; when nine anas were decreed to Shabaz Ali and seven to Khajah Ali, who obtained separate possession; plaintiff did not then come forward with her claim nor make any opposition: Shabaz Ali married the defendant, and settled his seven ana share of the zemindaree on her; and on his death Khajah Ali married her and settled his nine ana share also on her; so that the whole zemindaree belonged to her; and as the plaintiff had never preferred any claim for a period of 30 years from the death of Futteh Ali, her claim was not cognizable now. It was also urged, that the daughters of zemindars in Serai, for many generations, had never obtained shares of the paternal estate.

The defendant, Jumeelah Beebee (the other wife of Khajah Ali) made a similar reply; and Khajah Ali himself pleaded possession as proprietor for 28 years; and stated that he had made two marriages and had given his property in dower to his two wives. He further stated, that the plaintiff made no opposition, but had given him a deed of release in the year 1203 B. S.

On the 27th of November 1815, the Third Judge of the Dacca Provincial Court dismissed the suit on proof of the deed of release granted by the plaintiff, and on the ground of her having allowed 30 years to elapse from her father's death without making any claim.

On appeal to this Court the decree of the Provincial Court was affirmed, and the claim dismissed as not cognizable, under section 14, regulation 3, of 1793, and third clause of section 2, regulation 2, of 1805, owing to the lapse of more than twelve years from the death of the appellant's father to the date of the institution of the suit.

RAI SHAM BULLUBH, Appellant,

1820.

*versus*PRANKISHEN GHOSE (Guardian of KISHENMONEE DASEE), July 4th.
Respondent.

THE action originated in the Zillah Court of Jessore, and as some of the property in litigation was situated in the Dacca Jelal-pore district, the suit was subsequently removed by the operation of regulation 13, 1808, to the Dacca Court of Appeal. The plaintiff was guardian of Kishenmonee Dasee: she sued for a five and six gunda share of an estate called Megha and other places, the annual produce of which was estimated at 6,666 rupees. The case as stated in the plaint, was as follows:—

Koonjbeharee, the original proprietor of the estate, had four sons, Ram Bullubh, Birj Bullubh, Jugut Bullubh, and Bhukut Bullubh; Ram Bullubh, the eldest son, in whose name the estate was registered, died childless in the lifetime of his parents. On the death of Koonjbeharee and his wife the lands continued registered in the name of Rambullubh, and were held in coparcenary by Jugut Bullubh (the plaintiff's father) and her uncles Birj Bullubh (defendant's father) and Bhukut Bullubh who was childless. In the year 1202 B. S., plaintiff's father died, leaving two daughters, namely, the plaintiff and Mussummaut Rughoomunee. In the year 1203 B. S., Birj Bullubh died, and in the year 1208 Bhukut Bullubh also died. The plaintiff continued to live in a state of union and coparcenary with the defendant until the year 1211 B. S., when they separated on account of some disagreement; and the defendant having refused to surrender the portion of the landed property which justly belonged to the plaintiff and her sister in right of their father, she was reduced to the necessity of bringing this action. For the defendant, it was contended, that the estate was not ancestral, having been originally acquired by Ram Bullubh, who devised it by will to his father Koonjbeharee, with the consent of all his brethren, and that on the death of Koonjbeharee, the plaintiff's father, shortly before he died, made over his right and title in the estate to Sham Bullubh (defendant and son of Birj Bullubh,) on condition that Birj Bullubh would suitably provide for the marriage expences of his infant daughters, which condition had been fulfilled.

It appeared, on investigation, that Ram Bullubh, who died in the lifetime of his father, left a widow, Mussummaut Golukmunee now surviving, that there was also living Bhuguwutee, widow of Bhukut Bullubh, besides the plaintiff and her sister, and the defendant. The plea of the defendant not having been established to the satisfaction of the Court of Appeal, a decree was passed after taking the opinion of the Hindoo law officer, awarding to the plaintiff and her sister Rughoomunee one-third of the estate, to be shared between them equally, another third to Sham Bullubh the defendant, and the remaining third to Bhuguwutee the widow of Bhukut Bullubh. Mussummaut Golukmunee, the widow of Ram Bullubh was declared entitled to food and raiment only, her husband having died during the lifetime of his father. Mesue

1820. profits were adjudged to the plaintiff, and costs of suit made payable by the defendant.

Rai Sham Bullubh, v. Prankishen Ghose,
An appeal having been preferred to the Sudder Dewanny Adawlut, the case came to a hearing on the 4th of July 1820, before the Fourth Judge (S. T. Goad) and after an attentive perusal of the evidence adduced in the case, there appearing no sufficient reason to disturb the decree of the Court below, it was affirmed accordingly, and the appeal dismissed with costs.

1820. KHAJA ARRATOON, and MUSSUMNAUTKUREEMOONISA,

Appellants,

versus

July 18th.

DOORGAPERSILAUD BHUTTACHARJYA, and others,
Respondents.

THE appellants in this case sued the respondents on the 1st of January 1811, to recover 2,682 rupees, 4 anas, 1 cowry, arrears of revenue on 9 dooms, 1 cannee, 5 gundas, 1 cowry, 2 krants of land. The plaint set forth that the land in question had forcibly been seized by the proprietors of Sundeeep, but by a decree of the Sudder Dewanny Adawlut, which was passed in the latter end of 1209 B. S., it was reannexed to Deccan Shahbazpore the zemindaree of the plaintiffs. That on discovering that the zemindars of Sundeeep had, while in possession, let out the lauds at a low rent, for the purpose of defrauding them, and had given a great deal also in rent-free tenures, and that the farmers at the settlement made for the pergunna, colluding with the zemindar's *gomashias* and with the *aumeens* had caused them to make an improper measurement and assessment, and had acquired lands at a low rent, the plaintiffs issued notices to them to appear and pay the revenue of the lands in their possession, according to the rules and measurement of the pergunna; that many did so, but others refused, among whom were the defendants; for this reason, and as the rent demandable could not be adjusted in any other way, the plaintiffs in 1216 B. S. caused a measurement, and again issued a notice to the farmers, notwithstanding which they did not appear; and as by assessment according to the usage of the pergunna and measurement, the rent of the lands is 2,762 rupees, 1 ana, 15 gundas, that sum is now claimed as the money due to the plaintiffs from the defendants after deducting 79 rupees, 13 anas, 14 gundas, 3 cowries, received for the year 1216 B. S. These were the grounds of the action.

After the plaint had been filed, in consequence of pergunna Deccan Shahbazpore having been annexed to the Zillah of Chittagong, the papers of the case which had been filed in the Backergunge Zillah Court were referred to the Judge of Chittagong.

The defendants stated in reply, that theirs was a *mokurreree* tenure of the nature termed *Jungulbooree*; that the lease of it had been taken from the zemindars of Sundeeep by their father, and the

lands cultivated with much trouble and expence; that in the year 1195 B. S., Mr. S. Bird, Collector, on the part of Government, had measured the land, and had assessed it with the annual *jumma* of 81 rupees, 2 anas and 5 cowries, at which rate they had ever since continued to pay rent; in short, that the plaintiffs had no right to enhance the rent which had been paid for twenty-three years, and assessed before the decennial settlement, or to measure the land which had already been formally subjected to measurement.

1820.

Khaja Ar-
ratoon and
Mussum-
maat Ku-
reemoonisa,
v. Doorga-
pershaud
Bhatta-
chajya and
others.

The Zillah Judge on the 22d of March 1813, dismissed the claim with costs, giving judgment for the defendants to the following effect: the first regulation of 1793 does not empower any zemindar to increase the revenue fixed by the Collector on the lands of his estate, and on the contrary, the seventh section of regulation 44, 1793, declares that the rent fixed at the decennial settlement on the lands of dependant talookdars is fixed for ever. Besides, clause 5, section 29, regulation 7, 1799, exempts from any increase of rent, the lands of such dependent talookdars as were exempted from any increase of assessment at the formation of the decennial settlement. The plaintiffs had no written engagement from the defendants agreeing to an augmentation, and they had paid rent for a period of twenty-three years according to the assessment fixed in the year 1195 B. S.

The plaintiffs appealed to the Dacca Provincial Court, and on the 14th of April 1817, the First Judge of that Court confirmed the zillah decree for the reasons stated therein, and dismissed the appeal with costs.

A petition for a special appeal was presented to this Court, which was granted, and the case came to a hearing before the First and Fourth Judges (J. Fendall and S. T. Goad) on the 25th of April 1820. All the papers of the case having been perused, the Court observed, that the respondents had stated in their reply, that 11 caunies, 9 cowries, 1 krant of land had been obtained by their ancestors under a *Jungulboore pottah*, and been enjoyed by them and their descendants for 27 years from the date thereof, and that the Collector had at the decennial settlement fixed the rent payable by them at 81 rupees, 2 anas, 1 gunda, 1 cowry. But the respondents had not produced the *pottah* on which they founded their title, but only a rent roll dated 1195 B. S., shewing the rate at which the respondents had paid till 1216 B. S. and a letter from the Collector of Chittagong to the Board of Revenue, dated March 19, 1805, from which it appears plainly that the above sum was the rent fixed on 11 caunies, 2 cowries, 1 krant of land. The respondents had moreover stated, that as long as there was no increase in the appellants assessment, they had no power to augment the settled rate of rent paid, or to measure lands possessed by them (respondents), inasmuch as that rate had been sanctioned by the Collector at the decennial settlement, and could not therefore be altered. They had adduced in support of this plea the 1st clause of section 51, regulation 8, 1793, and the 7th section of the 44th regulation of 1793. The Court further observed, that they had only now to ascertain and decide whether, according to the contents of the *pottah* acquired by respondents

1820.

Khaja Ar-
ratoon' and
Musunn-
dant Ko-
reemoonisa,
v. Doorga-
persaud
Blutta-
chajya and
others.

ancestors, and the above regulations, the lands in the possession of the respondents could be measured and assessed, or not: considering that the respondents had for 23 years been in uninterrupted possession of 11 caunies, 2 cowries, 1 krant of land, which had been assessed at the decennial settlement at 81 rupees, 2 annas, 1 cowry, 1 gunda, the Court were of opinion that the appellants had no power to enhance the rent payable for so much land; that although the meaning of the *pottah* was not clear, yet the 8th section of the 8th regulation provides as follows: "Talookdars, whose tenure is denominated *Jungulhooree*, and is of the following description, are not considered entitled to separation from the proprietors of whom they hold. The *pottahs* granted to these talookdars, in consideration of the grantee clearing away the jungul, and bringing the land into a productive state, give it to him and his heirs in perpetuity, with the right of disposing of it either by sale or gift, exempting him from payment of revenue for a certain term, and at the expiration of it subjecting him to a specified *assul jamna* with all increases, *abwabs*, and *mhato ts* imposed on the pergunna generally; but this for such part of the land only as the grantee brings into cultivation: and the grantee is further subjected to the payment of a certain specified portion of all complimentary presents and fees which he may receive from his under tenants, exclusive of the fixed revenue. The *pottah* specifies the boundaries of the land granted, but not the quantity of it until it is brought into cultivation." It was therefore plain, in the opinion of the Court, from this enactment, that the above being a *Jungulhooree pottah*, the respondents and their ancestors ought to have paid an increase of rent in proportion to the quantity of land brought into cultivation, and if at the time of the measurement they possessed any land for which rent had not been paid for 23 years, they ought to have paid the rent of such lands to the appellants, according to the usage of the pergunna; that the rent fixed for respondents lands by the Collector at the decennial settlement, and sanctioned by the Board of Revenue referred only to 11 caunies, 2 cowries, 1 krant of the lands in possession of respondents; that when the appellants obtained a decree annexing the land held by the respondents to their estate, and summoned the respondents to make a settlement according to the usage of the pergunna for the lands possessed by them, they (respondents) did not attend; whereas they ought to have gone to the appellants and made a fresh settlement; but as they had not done so, the appellants by the 8th clause of section 15, regulation 7, of 1799, have full power to measure the lands possessed by the respondents, to assess them according to section 8, of regulation 5, 1812, and to take rent from the respondents according to the usage of the pergunna, and if the respondents are dissatisfied they must give up such land to the appellants, who otherwise have the power to dispossess them and to let it to others. That it appeared from the Zillah Court's decree, which was confirmed by the First Judge of the Provincial Court, that the lease of the respondents land was in perpetuity. If it be true that the respondents taluk is in perpetuity, then by section 29 of regulation 7, 1799, it is exempted from any increase of rent. As however

81 rupees, 2 anas, 1 gunda, and 1 cowrie, which had been paid for twenty-three years, was the rent fixed by the Collector for 11 caunies, 2 cowries, and 1 krant of land only, it was but just, if it should be found on measurement that the respondents were in possession of more than the above land, that the appellants should receive the rent of such excess of land. For these reasons the Zillah and Provincial Courts decree, dated 23d March 1813, and 14th April 1817, were reversed, and a decree passed empowering the appellants to measure the lands possessed by the respondents, either with the measurement common in the pergunna, or one appointed by the Collector of Chittagong; to assess from 1227 B. S., all lands exceeding 11 caunies, 2 cowries and 1 krant, possessed by the respondents, according to section 8, regulation 5, of 1812, to grant a new lease, and take a corresponding agreement; and in case of refusal on the part of the respondents, allowing the appellants to let the above lands to others. The respondents were ordered to pay the costs of all three Courts.

1820.

Khaja Ar-ratoon and Mussum-maut Kureemoonisa, v. Doorga-pershaud Bhutta-charjya and others.

ILIAS COONWUR, (Pauper, Widow of BUSSAWUN SING, and mother of RAJKOMAR SING, a minor), Appellant,

1820.

versus

AGUND RAI, Respondent.

May 24th.

THIS was a suit instituted by Mussummaut Chundermonee, and Bussawun Sing, 2d of July 1806, against the respondent in the Zillah Court of Sarun, to recover possession of mouza Hookam in pergunna Bal. Suit laid at 1,200 rupees annual produce.

The brother's daughter's son, and the grand-son of a daughter's son, cannot inherit according to the Hindoo law, even though there should be no other heirs.

The plaint set forth that the above mouza, consisting of 400 beegas of land, was the ancestral property of Nunda Rai, who died leaving two sons, viz. Mohukkum Rai and Bishen Rai, the latter of whom was the grandfather of the plaintiff's husband Soodee Rai, and of Rummun Rai, the father of the plaintiff Bussawun Sing; Mohukkum and Bishen obtained possession of the property, and were succeeded at their death by their widows; that the defendant (Agund Rai) who was *mokhtar* on the part of Mohukkum Rai's widow, took forcible possession of the whole property on her death: that when Soodee and Rummun Rai presented a petition for the recovery of one half of the estate, which belonged to them as the heirs of Bishen Rai; and to obtain the moiety of Mohukkum Rai's widow, they were referred to a suit; that therefore they now sued as the heirs of Bishen Rai, and of the widow of Mohukkum Rai.

The following is a sketch of the family in this case:—

NUNDA RAI,

Bishen Rai,

Mohukkum Rai,
widow died childless.

A daughter, married to Seruk Rai,

Rummun Rai,

Soodee Rai, widow, plaintiff.

Bussawun Sing, plaintiff.

Ilias Coonwur, appellant.
Rajkoomar Sing, appellant.

1820. The defendant stated in reply, that the mouza in dispute was the property of Ramchunder Rai, who died after having put his relation Nunda Rai into possession thereof. Nunda Rai was succeeded by his sons Bishen Rai and Mohukkum Rai, and on their death, their widows obtained and kept possession till 1192 F. S. In 1193 F. S., in consequence of a disagreement between the widows, Deo Coonwur, widow of Mohukkum Rai, demanded the separation of her moiety from the share of Bishen Rai's widow, and on the 15th of *Chyrt* 1194 F. S. appointed him (the defendant) her agent, and subsequently executed a deed in his favour appointing him her sole heir. The defendant accordingly in 1195 F. S., on the part of Mussummaut Deo Coonwur, sued the widow of Bishen Rai, and obtained a decree for a half of the above mouza, and Deo Coonwur in consequence got possession of it; that in the year 1197 F. S., the plaintiff's ancestors sold their half share in the mouza to another person, from whom it was purchased in 1197 F. S. for 220 rupees by Deo Coonwur, who thereupon made over the whole mouza to him (the defendant) in *hibba-bil-iwuz* for 501 rupees, from which time he has been in undisturbed possession; that afterwards when Soodee and Rummun Rai sued the widow of Mohukkum Rai, and the defendant, under the name of Hunnomun Sing, laying claim to the entire mouza in dispute, their suit was dismissed; and that the present suit was contrary to the regulations; not having been preferred till after a lapse of more than 18 years from the time that Soodee and Rummun Rai sold their moiety of the property.

Ilias Coonwur, b. A-gund Rai.

On the 18th of December 1807, the Zillah Judge dismissed the suit with costs, on the grounds that the plaintiffs had sold their half share of the mouza in dispute to Debee Rai, from whom it had been purchased by Mussummaut Deo Coonwur, who had transferred it in *hibba-bil-iwuz* to the defendant, together with the moiety she enjoyed in her own right.

Bussawun Sing after the death of Mussummaut Chundermonee, appealed to the Patna Provincial Court, which confirmed the Zillah decree, and dismissed the appeal with costs on the 23d of May 1814.

Bussawun Sing presented a petition for a special appeal as a pauper to this Court, which was granted, and he was succeeded on his death by his widow and son the present appellants. The case came to a hearing before the First and Fourth Judges of this Court (J. Fendall and S. T. Goad) on the 17th of April 1820, when the pleadings having been perused, it being deemed advisable to ascertain in the first instance whether the appellants had any right of inheritance to the property left by Mohukkum Rai or Nunda Rai, the case was referred for the opinion of the pundits, and the following was the opinion contained in their *vyavastha* submitted in reply to the question of the Court. The property of Mohukkum Rai cannot descend by inheritance to the widow and minor son of Bussawun Sing the son of Rummun, because the law no where recognizes the brother's daughter's son as heir, nor would the claimant be entitled to succeed to Nunda Rai's or Bishen Rai's estate, even if there were no other heirs, because the law no where recognizes the grandson of a daughter's son as heir. Soodee Rai and Rummun Rai are not the *Sapindas* and *Sagotras* of Nunda Rai

or Mohukkum Rai. They are *Sapindas* (a) but not *Sagotras*. 1820.
Lawyers have divided *Sapindas* into two descriptions; first by affinity, and secondly by funeral oblation. The first sort includes the descendants of a person to the seventh generation, to which stage the strength of consanguinity extends. As this strength of consanguinity existed in the parent of the mother of Rummun Rai and Soodee Rai, they are *Sapindas* of Nunda Rai. The second description of *Sapindas* are those who are connected by funeral oblations, and Soodhee Rai and Rummun Rai are *Sapindas* in this way also of Nunda Rai; as they offer the funeral cake to their maternal grandfather, in which Nunda Rai participates; but Mohukkum Rai stands in the same relation as Bishen Rai to Nunda Rai, and consequently to Soodee Rai and Rummun Rai. The latter therefore are *Sapindas* to Mohukkum. Though they are *Sapindas*, however, they are not *Sagotras* (that is to say, of the same lineage) and consequently cannot inherit. The authorities for this opinion are contained in the *Mitakshura*, *Purasura Madhuva*, *Muduna Parijata*, *Nirnya Sindhoo*, and other legal works current in Benares.

Authority 1.—*Yajnywalkya*: a wife, daughters, both parents, brothers, their sons, kinsmen sprung from the same original stock, distant kindred, a pupil, and a fellow student in theology.

Authority 2.—In the *Purasura Madhuva* a *Sapinda* is thus defined: those are *Sapindas* who are connected by the tie of consanguinity, for instance, a father and son are *Sapindas* to each other, and the body of the father is perpetuated in the son without any intervention: so also the son is by the medium of his father a *Sapinda* of his paternal grandfather and paternal great grandfather; so also the son by the medium of his maternal grandfather is a *Sapinda* of his maternal aunt and uncle, and by the medium of his paternal grandfather he becomes a *Sapinda* of his paternal aunt and uncle; husband and wife also are reciprocally *Sapindas*, being connected by the same offspring. The wives of several brothers are also *Sapindas* to each other, as their respective husbands with whom they are connected by the same offspring sprung from the same stock. The relation of a *Sapinda* exists whenever the same lineage or consanguinity is found to exist.

Authority 3.—The definition of a *Sapinda*, as contained in the *Nirnya Sindhoo*, is the following: those are *Sapindas* between whom exist a reciprocity of giving or receiving funeral oblations.

(a) This description of persons are not considered as *Sapindas* generally, but only by *Madhuvacharjya* in his commentary on the *Purasura Madhuva*, a treatise current in Benares. It is universally admitted, however, that they are not *Sapindas* for the purpose of inheritance, and that they do not rank even among the most remote description of heirs, as in the following text of *Baudhayana*, *Colebrooke's Digest*, The paternal great grandfather and grandfather, the father, the man himself, his uterine brother by a woman of equal class with the father, his son, his son's son, and the son of that grandson; all these partaking of undivided oblations, sages pronounce *Sapindas* or near kinsmen allied by funeral cakes; those who share divided oblations, they call *Saculyas* or distant kinsmen allied by family; male issue by males being left, the estate of the father surely must go to them; on failure of *Sapindas*, the spiritual teacher, the pupil, or the priest usually employed at sacrifices, shall take the estate; on failure of them, the king.

1820.

Nias Coon-
wur, v. A-
gund Raj.

The fourth person and the rest share the remains of the oblation wiped off with *Cusa* grass; the father and the rest share the funeral cake; the seventh person is the giver of oblation; the relation of *Sapindas*, or men connected by the funeral cake, extends therefore to the seventh person, or sixth degree of ascent or descent. It should not be supposed that an uncle or nephew are not reciprocally *Sapindas*, as he who shares in the oblation offered by the uncle shares also in that offered by the nephew. In short, if any one of those who participate in the funeral oblation offered by one individual be also the presenter of a funeral oblation to one of his coparticipants, then the whole number become *Sapindas* to each other.

It appearing from the above opinion, that the claimants, although relations of and connected by the funeral cake with the deceased proprietors, did not stand in such a relation to them as conferred a title to take the heritage; and it appearing therefore of no consequence to the issue of the present case whether the transfer to the respondent was valid or otherwise, the decrees of the Courts below were affirmed, and the appeal dismissed with costs.

1820.

July 26th.

RANEE SOOMITRA, Appellant,

versus

RAMGUNGA MANIK, Respondent.

According to a custom prevalent in certain mountainous estates of Tipperah the ordinary rules of inheritance do not prevail, and the individual of the family designated *Jobraj*, and failing him the individual called *Burra Thakoor* succeeds to the estate and title of Raja.

THIS case was summarily decided by the Sudder Dewanny Adawlut in appeal on the 24th of March 1815. The evidence adduced and the proceedings gone through on that occasion have already been reported and published (a). In that case there were three appellants, namely, Urjun Manik Thakoor, Sumbhoo Chund Thakoor, and the present appellant (Soomitra.) On the summary decision being passed by this Court, they were of course each at liberty to institute regular suits, which they did in the Provincial Court separately. Judgment had been given against Urjun Thakoor, but he had not appealed. The suit of Sumbhoo Chund was still pending in the Court below, and that of Soomitra had been dismissed, from which decision she preferred the present appeal. The triennial amount of the assessment on the estate for which she sued was 419,028 rupees. Her plaint set forth little more than had been advanced in the summary suit; namely, that on the death of her husband Rajah Doorga Munee, as there existed no person who had been appointed to the office of *Jobraj*, she, as his widow, was entitled to succeed to the raj and zemindaree, notwithstanding which, the Collector had selected Ramgunga Manik for the office, who merely held the title of *Burra Thakoor*, and who had in fact disqualified himself from the succession by having assumed the title and estate on a former occasion, when he was ejected on proof that another held a superior title; Ramgunga having been ejected by order

(a) See the 1st case of printed reports for 1815.

of the Court of Sudder Dewanny Adawlut on the 24th of March 1809, on a suit brought against him by the late Rajah Dootga Munee, husband of the appellant (a). The defendant contended in reply, that he had been rightfully appointed; it being the invariable usage of the family that the *Burra Thakoor* shall succeed in default of the *Jobraj*, and with respect to the former suit between himself and the late Rajah, it was urged, with some reason, on his behalf, that this formed the strongest possible presumption in his favour, as the fact of his having been at variance with the late Rajah would naturally have induced the latter to supplant him by appointing a *Jobraj*, if he had been competent to nominate any other individual than the *Burra Thakoor*. To this plea the Second Judge of the Dacca Provincial Court in his decree, dated the 18th of September 1808, seemed to attach considerable weight, as the enmity of the parties to each other had been established; and deeming the family usage to be fully proved, as alleged by the defendant, he dismissed the suit.

Ranee Soomitra, v. Rāngunga Manik.

On appeal to the Sudder Dewanny Adawlut, the cause came to a hearing, on the 26th of July 1820, before the Officiating Judge (Courtney Smith), who, concurring generally in the opinion expressed by the Judge of the Dacca Court, affirmed his decree and dismissed the appeal with costs (b).

SOHAWUN LAL and MUHINDRANARAIN (Heirs of
BUKHTAWUR SINGH), Appellants,
versus
UJAIB RAI, Respondent.

1820.

July 26th.

THIS action was instituted in the Patna Provincial Court on the 1st of March 1814, by Ujaib Rai, in *forma pauperis*, against Bukhtawur Singh, Bideshee Tewaree, and Janoo Noorbaf, to recover possession of mouza Tekhra in zillah Sarun; the annual produce of which was estimated at 788 rupees, as well as to recover the mesne profits enjoyed by the defendants from the year 1210 B. S. to the year 1220 B. S., which were computed at 5,225 rupees.

The Sudder Dewanny Adawlut having decided that no duress was used by A. in a suit between A. and B. it is not competent to the Courts below to give judgment in favour of C. against A. on the ground of the proof of such plea.

It was admitted by the plaintiff in this case, that his uncle had made a conditional sale of the estate in question to the defendant Bukhtawur Singh, from whom the two other defendants derived their tenure; but it was contended, at the same time, that

(a) This case has been reported and published as the second case of 1809.

(b) This custom, by which the succession to landed estates invariably devolves on a single heir, without a division of the property, has been recognised and declared legal by regulation 10, 1800. A formal enactment was not perhaps necessary as far as the Hindoo law is concerned, that law itself providing for exceptions to its general rules, and declaring that particular customs shall supersede general laws. "A decision must not be made solely by having recourse to the letter of written codes; since if no decision were made according to the reason of the law (or according to immemorial usage, for the word *yucti* admits both senses) there might be a failure of justice."—*Colebrooke's Digest of Hindoo Law*, vol. 2, page 128.

1820.

Sohawwan
Lal and
Muhindran-
nain, v.
Ujaib Rai.

the transaction was not voluntary, the sale having been extorted by duress, and that, independently of this fact, his uncle had no power to dispose of lands of which he was not sole and exclusive proprietor; that the plaintiff himself being confined in jail for debt was not able to manage the affairs of the estate, when it was granted in farm to the defendant, Bukhtawur Singh, but that he (the plaintiff) continued to enjoy the *malikana* or proprietary dues, until the year 1209 B. S., when he was dispossessed altogether by the said defendant; and that he was about to bring an action for the recovery of his rights, when he was forestalled by one Jynarain Rai, a joint proprietor of the estate; that judgment was given against this claimant in the Zillah Court, for him in the Provincial Court, and ultimately against him in the Sudder Dewanny Adawlut. In reply, it was alleged by the defendant, that the conditional sale by the plaintiff's uncle was voluntary, and that no duress had been exercised; that consistently with the custom of the country and the family usage, that individual was fully authorized to dispose of the lands, and that the conditional sale had since become absolute.

The Chief Judge of the Patna Provincial Court considering it proved from the evidence adduced in the case that, independently of the fact that the uncle of the plaintiff had no authority to sell, the sale was not voluntary, and was extorted by duress, gave judgment for the plaintiff with costs, leaving Bide-hee Tewaree and Janoo Noorbaf, who held under Bukhtawur Singh, to sue that individual for any sum they might have paid him in consideration of their tenure.

Bukhtawur Singh being dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut, and dying shortly afterwards, was succeeded by his heirs the present appellants. The cause came to a hearing before the Officiating Judge (Courtney Smith) on the 15th of July 1820. On reference to the decree of this Court, in the cause above alluded to (Jynarain Rai *versus* Bukhtawur Singh) which was decided on the 9th of November 1809, it appeared that no permission was granted to institute a new suit for the recovery of the mouza in question; on the contrary, that one of the reasons assigned for dismissing the suit of that claimant, was the fact of Ujaib Rai's not having put in any claim up to the date of the decision. The Officiating Judge therefore observed that, as in the former suit the silence of Ujaib Rai up to the year 1809 was considered sufficient to invalidate the claim of the former respondent, and to establish the claim of the former appellant, so his silence up to the year 1814 must *a fortiori* be held to operate against his present claim. The plea of intermediate possession was regarded as wholly unworthy of credit. As to the point of the alleged duress, he observed that, being as it were a *res judicata*, the Court below were not competent to entertain such a plea. The dismissal of Jynarain's suit in the Zillah Court in the year 1803 was founded on the disproof of this allegation, and although the zillah decree had been reversed by the Patna Provincial Court, yet the latter decision had been itself reversed on appeal by the Sudder Dewanny Adawlut, in the decree of which Court it was distinctly stated

that the plea of duress was unfounded and disproved. The Fourth Judge (S. T. Goad) fully coinciding in the opinion expressed by the Officiating Judge, the decree of the Patna Provincial Court was reversed on the 26th of July 1820, and costs of both Courts made payable by respondent.

KISHENDAS, Appellant,

1820.

versus.

DIRGPAL SINGH, Respondent.

July 31st.

THIS action was instituted by Dirgpal Singh in the Provincial Court of Patna, on the 20th of July 1810, against Kishendas, and the widow of Rajah Jeswunt Singh, to recover the sum of 5,833 rupees, principal and interest of money lent. The case as stated in the plaint was as follows :

In the year 1214 B. S., the widow of Jeswunt Singh borrowed the sum of 10,000 rupees from Kishendas, and as security for the repayment thereof assigned to him in mortgage the talook of Kunjhoree and seventy other mouzas, the usufruct to be enjoyed by him for the term of seven years. She besides executed to him a bond for the amount, and invested him with full power to collect the rents and realize the profits of the mortgaged estate. Subsequently Kishendas borrowed from the plaintiff the sum of 5,000 rupees, on a promise to pay him half the sum named in the bond, and to make over to him half the profits that might be realized from the estate; and having executed an agreement to that effect, made over to him for his satisfaction the bond he had received from the widow of Jeswunt Singh. The period specified in the bond had expired, and the plaintiff had not received a single rupee in liquidation of the debt due to him. The defendant, Kishendas, replied, by stating that the plaintiff had voluntarily and of his own accord undertaken the risk of the speculation, and that as the money had not been realized from the widow of Jeswunt Singh, he, the defendant, was not answerable. The widow of Jeswunt Singh pleaded that she had no concern with the plaintiff, and that the debt which she had contracted to the other defendant had been liquidated from the profits of the mortgaged estate.

On the 28th of April 1817, the Second Judge of the Patna Court gave judgment to the following effect: The defendant, Kishendas, admits that he borrowed from the plaintiff the sum of 5,000 rupees on the terms alleged by the plaintiff. As for the debt which the widow of Jeswunt Singh contracted to him, it appears clear that he was satisfied with the security which she furnished to him, and to that alone was he authorized to look for payment. From the evidence of the witnesses, it is presumable that he actually did receive more from the profits of the mortgaged estate than the sum advanced by him; otherwise he would undoubtedly have taken steps to bring the estate to sale, in the event of the debt not being liquidated by the profits received, before the expiration of the term named in the deed of mortgage. On these

A, having lent 10,000 rupees on mortgage of lands to B. and afterwards borrowed from C. 5,000, on an agreement that C. should have half the annual profits of the mortgage, and A. having given to C. as security, the custody of the mortgage bond, but retained the documents authorizing him to make the collections, held that this is a simple transaction between A. and C. the former being accountable to the latter, without reference to the proceeds of the mortgaged estate.

1820.

Kishen Das,
v. Dirgpal
Singh.

grounds he adjudged the sum claimed by the plaintiff to be paid by the defendant, Kishendas, with interest and costs of suit.

On appeal to the Court of Sudder Dewanny Adawlut by Kishendas against this decision, it was affirmed by the Officiating Judge (Courtney Smith) on the 30th of July 1820, on the following grounds: The proceedings do not shew that there was any transaction whatsoever between Dirgpal Singh and the widow of Jeswunt Singh; although in the agreement executed by Kishendas to Dirgpal it certainly is mentioned that the debt due by the former to the latter is to be liquidated by the profits, if any, realized from the mortgaged estate, yet it is no where stipulated that, in the event of there being no profits forthcoming, Kishendas was to be exonerated from the debt which he had incurred. Besides, it appears that of all the securities made over by the widow of Jeswunt Singh to Kishendas, the only one which he delivered to the custody of Dirgpal was the bond. The other documents, from which alone the power of levying rents and realizing profits could be derived, he retained in his own possession. It matters nothing whether Kishendas did or did not realize his debt from the estate mortgaged to him by the widow of Jeswunt Singh. He had to look to her alone, but Dirgpal had nothing to do with her, his concern was with Kishendas only. The Officiating Judge observed that Kishendas was at liberty to sue the widow of Jeswunt Singh for the recovery of the debt alleged to be due, a measure which he could not be held to be precluded from adopting by the incidental mention in the decree of the Provincial Court, that the amount of it must have been realized. The costs in both Courts were made payable by the appellant.

1820.

Aug. 2nd.

MEER UBDOOL KUREEM, Appellant,

versus

FUKHROONISA BEGUM, Respondent.

Held that a woman having preferred a claim against her father-in-law for certain real and personal property, and her claim being dismissed, it is not competent to the Court to award her a

THIS was an action instituted in the Patna Provincial Court by Fukhroonisa Begum, in *forma pauperis*, against Meer Ubdoool Kureem, for the recovery of considerable property real and personal. The total amount of the claim was 62,509 rupees. The plaintiff set forth that Mudaroollah, the original proprietor, died in the year 1212 F S, having a short time previous to his death, made his property into sixteen portions, of which he gave twelve to his wife Ladlee Begum, two to the defendant, and two to Meer Ubdoool Kureem his brother; that in the year 1215, Ladlee Begum caused the plaintiff to be united in marriage with her grandson Meer Jewun, who died in the following year; and that Ladlee Begum herself died in the year 1217, having previously made an oral gift to the plaintiff of her entire property, in the presence of several persons, and having desired the defendant to reduce to writing her will to that effect; that the defendant omitted to do so, and had

wrongfully usurped the whole property left by the deceased Begum. 1820.

The defendant in reply, stated that Mudaroollah had not given to his wife Ladlee Begum twelve portions of his property absolutely; that he certainly had conveyed to her eight portions as a free gift; but that four out of the twelve portions were expressly reserved in the deed of transfer, and directed to be appropriated to the maintenance of certain endowments and other religious purposes; that the widow Ladlee Begum had transferred to him (the defendant) the whole twelve shares to be held on the same terms; and that, in point of fact, the present suit was instituted maliciously at the instigation of the plaintiff's relations, she having been married to the son of the defendant, and having quarrelled with him regarding the place of her residence, she wishing to continue with her own relations, and the defendant being desirous that she should take up her abode in his dwelling.

monthly allowance payable by the defendant, no such claim having been preferred by her. Order for costs of suit to be paid by the successful party reversed.

The original deed of transfer executed by Mudaroollah having been filed in Court by the defendant, it being on the part of the plaintiff admitted to be authentic and genuine, and containing, as stated by the defendant, a provision that four out of the twelve portions of the property conveyed to Ladlee Begum should be appropriated to religious purposes, which disposition, as appeared from the opinion of the law officer (a), could not be altered by the widow; the Second Judge of the Patna Court deemed this circumstance alone sufficient to invalidate the claim of the plaintiff, who had asserted her right to the whole twelve portions. He therefore dismissed the claim, but under the circumstances of the case, directed that the defendant should pay the plaintiff a monthly allowance of twenty-five rupees as maintenance, on the ground of her being the widow of the grandson of Ladlee Begum, and of the son of the defendant. Costs of suit were likewise made payable by the defendant.

Meer Ubdool Kureem being dissatisfied with the above decision appealed to the Court of Sudder Dewanny Adawlut. The Officiating Judge (Courtney Smith), before whom the cause came in appeal, observed, that the Second Judge of the Patna Court, notwithstanding the fact of his having dismissed the claim as groundless, on the opinion of his law officer, had nevertheless awarded a monthly stipend to the claimant, and had moreover made the appellant answerable for all costs of suit. He was of opinion, that the decision of the Court below, except in so far as regarded the dismissal of the claim, should be reversed; as judgment had been given for that which was never claimed, and it was manifestly contrary to the spirit and intent of the regulations, that the successful party should be subjected to the costs of suit. He therefore ordered (subject to the concurrence of another Judge)

(a) It is a well known maxim of Moohummudan law, that to render a gift valid it is necessary that the subject of it be defined, and distinct and separated from all other property not intended to be conveyed, or which cannot lawfully be conveyed by gift. In this case the property reserved for religious purposes could not legally have been transferred by gift. Consequently, the gift of the eight portions, even supposing it to have been established in fact, could not have been upheld in law, as they were transferred simultaneously with the four portions, the transfer of which was illegal.

1820. that so much of the decree of the Court below as awarded a monthly allowance to the respondent, and made costs payable by the appellant, be reversed; that the costs of suit be declared payable by the respondent; but that she being a pauper, half the amount of fees of the appellant's *vakeel* be in the meantime discharged by him agreeably to section 25, regulation 27, 1814; and in this opinion being joined by the Fourth Judge (S. T. Goad) on the 2d of August 1820, a final decree was passed to the above effect.

1820.
Aug. 4th.

RAJAH DEEDAR HOOSEIN, Appellant,
versus
RANEE ZUHOORONISA, Respondent.

The claimants to a Moosulmann's property being three widows, three daughters, a mother and a brother, the property should be made into 72 parts, of which the widow v should get 9, the daughters 48, the mother 12, and the brother 3, and one of the daughters, dying before the distribution, the estate should be made into 216 parts, and the shares of all the claimants (except the two step-mothers) proportionally augmented.

THE parties in this were the same as those in the printed case No. 7, of 1822. Some part of the estate of which Mussummaut Zuhooroonisa had obtained possession was rent free, and for this portion Deedar Hoosein sued in the Provincial Court, estimating eighteen years at 6,300 rupees. The claim too rested on the same foundation, namely, the will of Fakhroodeen Hoosein, the agreement of Akber Hoosein, and the immemorial usage of the family. It was rejected by the Provincial Court for the same reasons as were stated in the former decree.

The case being brought by appeal before the Sudder Dewanny Adawlut, the Fourth Judge (S. T. Goad) was of opinion that the decree of the Court below should be affirmed. The Officiating Judge (C. Smith) however observed that there was an omission in the decree of the Court below, which had not been supplied by the Fourth Judge, and that it therefore required amendment. The rent free lands for which the present claim was brought, it appeared, were not ancestral property, but had been purchased by Akber Hoosein with his own funds. He was of opinion, therefore, that the appellant was not entitled to the property, not from any failure on his part to prove the existence of the family usage, which he had pleaded, but from the fact that such usage could not apply to the lands in dispute. On whatever ground, he observed, the claim of the appellant might be dismissed, it became necessary to provide to whom the rent free lands should belong, and the Fourth Judge had not expressed his opinion that they belonged of right to the respondent, but merely his concurrence as to the rejection of the appellant's claim. As the lands in question were acquired by Akber Hoosein alone, the Officiating Judge recorded his opinion that it should be distributed among his heirs according to the Moohummudan law of inheritance; and being joined in this opinion by the Chief Judge (Sir J. E. Colebrooke) a decree was passed awarding to the surviving heirs the following shares, to which, from the *futwa* delivered by the law officers in the case, they appeared respectively entitled. The whole rent free landed property was made into two hundred and sixteen shares, of which Soomran Beebee, the mother of Akber Hoosein was to have thirty-

six, Zuhooronisa, his wife, and Deedar Hoosein, his brother, seventeen each, Beebee Goolchumun and Beebee Doornunee his other wives, nine each; and Mussammaut Bhinkee and Mussammaut Hunka his daughters, sixty-four each. (a)

1820.
Raja Deedar Hoosein, v. Ramee Zuhooronisa.

(a) The above was the state of the family at the time the final decree was passed, as since the death of Akber Hoosein one of his daughters named Fyzoonia had died, which brought the case under the rules for vested inheritances: (see *Principles and Precedents of Moohummudan Law*, page 27.) On the death of Akber Hoosein leaving widows and daughters, and a mother, whose shares respectively are an eighth, two-thirds and a sixth; (see *Principles and Precedents of Moohummudin Law* rules 14, 17, 33,) the property should originally have been made into twenty-four parts, (*ibid* rule 66.) but after the mother had taken her sixth or four, and the widows had taken their eighth or three, there would remain only seventeen to be divided among the three daughters, which obviously cannot be done without a fraction, and 3 being prime to 17, the rule is (see the third principle of distribution, 77) that the whole number of heirs who cannot get their shares without a fraction, which is three, be multiplied into the number of the original division. Thus $24 \times 3 = 72$, which should be distributed in this manner:—

Mother Soomrun, 1-6th 12.	Widow Zuhoor oonisa, 3.	Widow Gool- chumun, 1-8th 3.	Widow Doorn- unee, 3.	Daughter Fyzooni- sa, 16.	Daughter Bhinkee, 2-3ds 16.	Daughter Hunka, 16.	Brother Deedar Hoosein, 3. respondent.
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but Fyzoonia having died before any distribution, the estate must be subjected to the rules of vested inheritances according to which (see rule 97) it must first be ascertained into how many shares the estate should be made to satisfy her heirs, who appear to be her mother Soomrun, her two sisters Bhinkee and Hunka, and her uncle Deedar Hoosein. Here the share of the mother being one-sixth, and of the sisters two thirds, the property should be made into six shares, which in the first instance should be distributed as follows:

Mother Zuhooronisa, 1.	Sister Bhinkee, 2.	Sister Hunka, 2-3ds 2.	Uncle Deedar Hoosein, respondent. 1.
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This number should then be compared with the number of shares to which the deceased was entitled at the original distribution, and being found to be composit, or agreeing in 2, that being their common measure, the rule is (see 99, *ibid*.) that the aggregate and individual shares of the preceding distribution be multiplied by the measure of the number of shares into which it is necessary to make the estate at the subsequent distribution, and that the individual shares at the subsequent distribution be multiplied by the measure of the number of shares to which the deceased was entitled at the preceding one. Thus three being the measure of six $72 \times 3 = 216$, and $12 \times 3 = 36$, share of Soomrun: $3 \times 3 = 9$, share of widows: $16 \times 3 = 48$, share of the two surviving daughters, and $3 \times 3 = 9$, share of the mother; and eight being the measure of sixteen $1 \times 8 = 8$, additional share of Zuhooronisa, (total $9 + 8 = 17$) and $2 \times 8 = 16$, additional share of each sister, (total $48 + 16 = 64$) and $1 \times 8 = 8$ the share of Deedar Hoosein, (total $9 + 8 = 17$.)

There was a third cause between the same parties for the personal property of the deceased Raja Akber Hoosein, which was estimated in the plaint at three lakhs and ninety thousand rupees. It was dismissed in the Provincial Court, and also in appeal by the Sudder Dewanny Adawlut; the sum due to the widow on account of dower being considered as a set off to the claim.

1820.

BALNATH SAHOO and GOPEENATH SAHOO, Appellants,

versus

Aug. 7th. RAJAH BUDDUN MOHUN SINGH and others, Respondents.

The Courts
are not
competent
to strike off
interest on
the ground
of delay in
suing for a
debt, if the
claim be
otherwise
cognizable.

THE father of the respondents was a zemindar whose estate was situated in the district of Bhaugulpore. Finding difficulty in the punctual payment of his rents, he borrowed the sum of eight thousand and seventeen rupees from the appellants. There were other pecuniary transactions between them, but the respondent's father died, having discharged only the sum of one hundred and thirty-eight rupees of the debt at different times. After his death the respondents, his sons and successors, paid about twenty-five rupees, but failing to liquidate any part of the remainder, this action was instituted against them on the 23d of August 1814, in the Provincial Court of Moorshedabad, to recover the sum of 15,871 rupees, being the sum lent, with interest to the same amount, deducting the payments made. The respondents, who were defendants in the Court below, denied generally the alleged debt, and objected to the exorbitant charge of interest. Both these objections, however, were overruled by the Judge of the Court of Appeal. They further pleaded that the suit was not cognizable, the cause of action having originated twelve years before. It appeared in evidence, that the debt was contracted in the year 1790, but that within twelve years prior to the institution of the suit the demand had been admitted; and the decree of the Provincial Court recited that the same rule (section 14, regulation 3, 1793), which prohibited the trying any suit whatever against any person, or persons, if the cause of action shall have arisen twelve years before the suit shall have been commenced on account of it, excepts the case in which the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendants had admitted the truth of the demand or promised to pay the money. The Judge of the Provincial Court therefore adjudged the payment of the principal claimed, but did not award any interest, assigning as a reason the long period which the plaintiff had permitted to elapse without having prosecuted his claim in a court of justice.

The appellants being dissatisfied with this judgment preferred an appeal to the Sudder Dewanny Adawlut to recover the remainder of the claim on account of interest to the amount of 7,854 rupees. The Officiating Judge (C. Smith) before whom the case first came in appeal, observed, that there was nothing in the regulations to warrant a refusal to award interest where it may have been expressly stipulated, as in the present case, on the ground that the claimant had suffered a long period to elapse before he instituted his claim. He therefore recorded his opinion that the interest claimed should be awarded, and that the decree of the Provincial Court should be amended to that effect. The Fourth Judge (S. T. Goad) having concurred in the above opinion, a final decree was passed accordingly. The costs of both Courts were made payable by the respondents.

MOULOVEE SYUD ASHRUF ALI, Appellant,

1820.

versus

MIRZA QASIM and others, Respondents.

Aug. 24th.

MOULOVEE SYUD ASHRUF instituted this action in the Patna Provincial Court on the 1st of April 1814, for the proprietary right to certain *altumgha mehals*, situated in pergunna Noubutpoor Bulia, against the respondents and Mirza Moohummud Nubee, Mussumaut Hooseinee Khanum, and Mussumaut Arjumund Khanum. The claim was laid at 7,315 rupees. The plaintiff set forth, that the lands in question were the property of Imamee Begum, who died leaving her husband Mirza Moohummud Bakir, three sons, Mirza Moohummud Kazim, Mirza Moohummud Qasim, and Mirza Moohummud Nubee, and one daughter, Hooseinee Khanum, her surviving. Subsequently, Moohummud Kazim died, and his father Moohummud Bakir became his heir, and he and Moohummud Qasim acting on their own behalf, and also as guardians to the minors, Moohummud Nubee and Hooseinee Khanum, sold the estate to the plaintiff. The price stipulated was 5,501 rupees. Earnest money to the amount of 501 rupees was immediately given, and afterwards, on the sum of 2,001 rupees being advanced in part payment, the deed of sale was made out and delivered to the plaintiff, but various frivolous excuses were made when measures were about to be taken for its authentication. The defendants had since fraudulently set up Arjumund Khanum as a joint proprietor of the estate, and guardian of the minors shares, and had instigated her to make a complaint of dispossession against the plaintiff, in consequence of which he had been referred to a regular suit to establish his proprietary right.

The sale by a Moosulman of his children's lands, he having declined the guardianship of them, held to be null and void, and he was directed to refund the purchase money with interest, with liberty, however, to sue his children for the recovery of the money, if it was expended for their benefit.

Arjumund Khanum appeared to defend the suit on her own behalf, and on behalf of the minors. She stated, that Imamee Begum being disgusted with the conduct of her husband, Moohummud Bakir, had made a nuncupative will, constituting her (Arjumund Khanum) guardian of her children, which fact could be proved; and that Moohummud Bakir had no power to dispose of his children's estate, he having, before this transaction originated, formally and in a court of justice renounced the guardianship of it. To this the plaintiff replied, that a woman was incompetent to the office of guardian, and that while the father survived, he was the only proper and legal guardian; that on the death of Imamee Khanum, her estate should have been made into twenty-eight shares, of which Moohummud Bakir, on her death, was entitled to seven as husband, and on the death of Moohummud Kazim to six as father, total, thirteen shares; that he was guardian of the six, and three shares, the property of Moohummud Nubee, and Hooseinee Khanum respectively, and that he had joined with Moohummud Qasim, the proprietor of the remaining six shares, in selling the estate, which was in every respect a legal and valid transaction. Arjumund Khanum dying at this stage of the proceedings was succeeded by Moohummud Qasim (who had in the meantime come of age) who defended the suit for himself, and on behalf of his minor brother and sister. The other defendant, Moohummud Bakir, did not appear.

1820.

Monlovee
Synd Ash-
raf Ali, v.
Mirza Qa-
sim and
others.

It appeared from the evidence adduced in the case, that at the time the sale took place, Moolhummud Qasim could not have been more than fourteen years of age, and it also appeared from the production of a former decree, that Mirza Moolhummud Bakir was in no way authorized to exercise the powers of guardian, and that he himself had absolutely renounced all concern over his children's property. For these considerations, on the 18th of July 1817, the Chief Judge of the Patna Court dismissed the plaintiff's claim to the estate, but awarded repayment with interest of the sum advanced by him as purchase money to Moolhummud Bakir, to be repaid by Bakir alone; he being declared at liberty, should he have expended the sum realized for the benefit of his children, to come upon them for reimbursement by the institution of a fresh suit (2). The costs also were made payable by this defendant.

On appeal to the Sudder Dewanny Adawlut, the Fourth Judge (S. T. Goad) seeing no reason to disturb the decision of the Court below, it was affirmed accordingly.

The appellant was charged with the costs of appeal.

(a) It does not appear whether Moolhummud Bakir had recourse to this measure. If he did, it would have been necessary for him to prove that the debt was necessary for the support or education of the children. (See rule 11, page 69, *Principles and Precedents of Moolhummudan Law*) and for the circumstances under which the sale of landed property by a guardian is legal, see rule 14, page 70, *ibid.* That point however did not come into question in the present suit, as Moolhummud Bakir had expressly declined the guardianship of his children's property, and the sale of it therefore by him could not, under any circumstances, have been legal.

RAJAH JYPERKASH SINGH, Appellant,
versus

BABOO SAHIBZADA SINGH, Respondent.

1820.

Sept. 28th.

ON the 3d of June 1815, Rajah Jyperkash Singh sued Baboo Sahibzada Singh in the Patna Provincial Court, to recover the sum of 22,000 rupees, alleged to be due from the said defendant to plaintiff's father, Raja Bikramajeet. The debt, it was alleged, was incurred in the year 1210 F. S., and an order was made by the defendant to the amount of the debt in favour of the plaintiff's father, on one Ishreepershad, against whom the defendant had obtained a decree. The defendant simply denied the claim. In support of the claim the following vouchers were adduced, 1st, an undertaking from the defendant's agent agreeing to make an assignment of the decree obtained against Ishreepershad; 2nd, an *ikharnama*, or written obligation, from Sahibzada Singh to Bikramajeet, reciting, that it had been agreed between them, that, if the latter would become security for the former, he would pay him 22,000 rupees, that it had since become unnecessary to furnish security, but that as Bikramajeet had been ready to perform his part of the undertaking he (Sahibzada Singh) would grant him an assignment for the amount, on the decree due by Ishreepershad; 3rd, assignment from Sahibzada Singh, on Ishreepershad, reciting the agreement made to Bikramajeet to pay 22,000 rupees, in the event of the latter becoming security, which having been furnished, the assignment was granted accordingly; 4th, letter from Ishreepershad to Jyperkash, stating that he had paid to Baboo Sahibzada Singh himself, the amount of the decree adjudged against him. Six witnesses were examined in support of the claim, and considerable discrepancy was observable in their testimony; three of them alleging that the undertaking was executed in consequence of the plaintiff's father having consented to become surety for the defendant; and three others, that the promise was given in consideration of his agreeing to eat with the defendant. On the ground of the above, and other discrepancies, the claim was dismissed by the Second Judge of the Patna Court.

On appeal by Rajah Jyperkash Singh to the Sudder Dewanny Adalut, the Fourth Judge (S. T. Goad) after noticing the conflicting testimony of the witnesses, gave judgment to the following effect: It is admitted by the appellant and all his witnesses, that the security tendered by him was never required, as the Sudder Dewanny Adalut had refused to stay the execution of the decree in the suit out of which it originated. It is clear that the sum claimed was promised in consideration of the security, and the security was never accepted. The appellant's father therefore sustained no detriment, and was put to no inconvenience in tendering it. It is manifestly a nude pact, an agreement without a consideration, which cannot be enforced by the Court.

The appeal was dismissed with costs.

The Court of Sudder Dewanny Adalut will not enforce the payment of a sum of money promised by A. to B. if the security tendered by the latter for the former in consideration of which the promise was made had never been acted upon, even though the promise was absolute.

1820.

THE COLLECTOR OF BENARES, Appellant,

versus

Nov. 14th. OOMA BAEF (Widow), and RUGHOOONATH (Grandson of
SUMBHOOJEE PATUR), Respondents.

A lease granted in perpetuity by the Collector of Benares, will be at the grantee's death devolve on his heirs, if it have not been confirmed by the board of revenue or government.

THIS action was instituted on the 1st of March 1817, in the Benares Provincial Court, by the respondents against the Collector of Benares, Nunkoo Pande, Deves Dial Singh, Budlee Singh and Hurnam Singh, to recover possession of Beneepore, and two other mouzas, situated in pergunna Sheopore, under an *istimraee portah*, or lease in perpetuity, granted in favour of Sumbhoojee Patur, the husband of one, and grandfather of the other respondent: the triennial amount of *jumma* was stated at 5,103 rupees.

The plaint set forth, that the lands in question had always been in farm until Sumbhoojee applied for a perpetual lease of them, agreeing to pay up the sum of 500 rupees balance due from the last farmer; that on the 18th of March 1805, an order was passed by the Collector, that the balance should be received from Sumbhoojee, and a lease granted in perpetuity; and Sumbhoojee having paid in the balance accordingly, retained possession of the property, until the year 1814, when he died; upon which the plaintiffs, as his heirs, petitioned for a renewal of his lease, which request was refused, and the settlement was made with the other defendants, who claimed as zemindars, but who had no right whatever to that title.

For the defendant, it was urged, that the perpetual lease granted to Sumbhoojee had never been confirmed by the Board of Commissioners, or by Government; that the settlement had been made with him not as zemindar but as farmer, (under the provision contained in clause 2, section 18, regulation 6, 1795) whose interest ceased on his death, and that the title of Nunkoo Pande and the other defendants, as zemindars, having been proved, the settlement had been made with them, under the orders of Government.

On the 20th of July 1818, the Officiating Judge of the Benares Court gave judgment nearly in the following terms: It is not at all probable that Nunkoo Pande and the other defendant are the rightful proprietors. Had they been so, they would not have remained silent for such a length of time, but would assuredly have asserted their claims. On the death of Sumbhoojee no less than thirty-four different claimants appeared; and asserted their respective rights to the zemindaree, and each was prepared to substantiate his allegation by proof. This affords a strong presumption that the question as to who is the rightful proprietor is involved in considerable obscurity. Sumbhoojee clearly had a grant in perpetuity of the lands now claimed by his heirs. The confirmation of Government is not wanting. This sanction is not contemplated in the second clause of section 18, regulation 6, 1795. It is only required where the grant is limited in its duration; and the obvious reason of the difference is that the leaseholder in perpetuity becomes the proprietor, and stands in the same point of view as an auction purchaser, to whom it requires no special sanction to grant a lease; it being a general rule confirmed by the authorities in Eng-

land that the proprietors of the soil will be permitted to hold their estates at a fixed assessment for ever; but as there is no general rule prescribed by the same authorities for cases where the zemindar or rightful proprietor may not exist, in such cases the sanction of the ruling power is unquestionably necessary to the confirmation of a settlement. Besides, the words of the clause above quoted do not require that sanction should be given in case of a perpetuity lease, the words being "or otherwise the farm is to be let in perpetuity, or for such term as Government may direct." The plaintiffs are clearly entitled to recover. A decree was accordingly passed in their favour awarding to them, and their heirs and successors in perpetuity, the proprietary right to the lands claimed at the assessment fixed with Sumbhoojee, and adjudging costs and mesne profits to be paid by Government.

1820.

The Collector of Benares, v. Oomd Bacc and Rungloonaath.

On appeal by the Collector from the above decision to the Sudder Dewanny Adawlut, the Chief and Fourth Judges (Sir James Edward Colebrooke, Bart. and S. T. Goad) gave judgment to the following purport: It appears that Manikchund, the late farmer of the mouzas in dispute died in balance to the amount of 500 rupees, when Sumbhoojee, the husband of the respondent, Ooma Bacc, presented a petition to the Collector for a perpetual lease of the lands, agreeing to pay the balance that had accrued upon them. He accordingly obtained a lease in perpetuity under the provisions of clause 2, section 18, regulation 6, 1795, at an annual rent of 1,701 rupees, in consequence of no person coming forward to claim as zemindar, and having discharged the former balance, he took possession of the lands, which he retained until his death, a period of eight years. After his death Nunkoo Pande, Deves Dial Singh, Budlee Singh, and Hurnam Singh, who were defendants in the Court below, and other individuals, preferred a claim to have the settlement made with them, as being the proprietors of the soil; and the Collector, on the ground that the lease granted to Sumbhoojee had not received the sanction of the Board of Revenue, or of the Governor General in Council, did not think proper to continue the settlement with his heirs; and deeming the claims advanced by Nunkoo Pande and the other individuals above named to be superior to all others, he concluded a perpetual settlement with them at an advanced rate. According to the rule contained in clause 2, section 18, regulation 6, 1795, on the death of Sumbhoojee, it would not have been legal to make a settlement with any other than the proprietor of the soil, supposing such person to be forthcoming, and admitting that when the lease in perpetuity was granted, no person came forward in that capacity, still that lease must have become null and void, if, within the period of twelve years from the date of its execution, any person preferred a claim of right, and (conformably to the provisions contained in clause 6, section 3, regulation 1, 1795) substantiated the fact, that the original proprietor or his heirs had been in possession at any period since the 1st of July 1775. The lease to Sumbhoojee was never confirmed by the Board of Revenue, or the Governor General in Council, nor did those authorities think proper to continue the settlement with his heirs. The reasoning of the Officiating Judge of the Patna Court, that under clause 2, section 18, regulation 6,

1820. 1795, the sanction of the Governor General in Council is necessary to a lease for a limited period only, and not to a lease in perpetuity appears to be incorrect; for in the first clause of the above quoted section, it is laid down, that on the death of the farmer the Collector is to have recourse in the first instance to the ancient zemindars of the village, *with the sanction of the Board of Revenue*. It is obvious from this provision, that no perpetual settlement can be made without the sanction of the Board of Revenue and the Governor General in Council. Besides, the Officiating Judge of the Court below himself admits that the sanction of those authorities is requisite to a lease for a limited period, and it stands to reason that such sanction is more essentially necessary in cases of a perpetual settlement with a view to the protection of the rights of Government. As the settlement with Sumbhojee did not receive such sanction, it cannot, after his death, avail his heirs. And the Collector was clearly at liberty under the fourth clause of section 18, regulation 6, 1795, to make a new settlement with the individuals who came forward and established their proprietary right.

The Collector of Benares, R. Oomiah Basse and Rungloonaath.

The decree of the Court below was reversed for the reasons above stated. The costs of appeal were made payable by the parties respectively, and the Collector was ordered to render to the heirs of Sumbhojee the balance of the revenue paid by that individual.

1820.

GOPAUL LAL, and others, Appellants,

versus

Nov. 28th.

MUHARAJA PITUMBER SINGH, Respondent.

In a case of mortgage with conditional sale, the tender to the mortgagee of the money borrowed, by a stranger to the transaction, is not sufficient to prevent a foreclosure.

THE facts of this case, as admitted by both parties, were in substance as follows:

In the year 1201. F. S., Pitumber Singh borrowed 5000 rupees from Gopaul Lal and the other defendants, and executed a deed of *bye but wuffa*, or mortgage, with conditional sale in their favour, of mouza Malawan and 14 other villages, as security for the debt, giving them an assignment on the rents as interest on the loan; the conditional sale to become absolute if the sum borrowed were not repaid within five years. Subsequently to this transaction, the Board of Revenue instructed the Collector of Behar to sell the villages in question, in satisfaction of a debt due by Pitumber Singh to Rajah Mitterjeet Singh, on account of a decree passed in his favour in the Court of Sudder Dewanny Adawlut. Rajah Mitterjeet Singh, on finding that the villages were clogged with a conditional sale, and consequently that they could not be brought to sale in satisfaction of his debt, deposited the sum lent by the conditional purchasers in the Civil Court. Notice of this deposit was conveyed to the conditional purchasers, but they would not receive it, and ultimately they prevailed in preventing the sale of the mortgaged lands, and Rajah Mitterjeet Singh recovered back from the treasury the sum which he had deposited.

Pitumber Sing sued the conditional purchasers in the Patna Provincial Court to redeem the mortgaged mouzas, and to obtain possession, on the ground of their having refused to receive back the money borrowed which was deposited by Rajah Mitterjeet Sing, and which was tendered to them previously to the period fixed for the foreclosure of the conditional sale, and before such sale had become absolute. It was alleged also by the plaintiff, that he had subsequently tendered repayment, which had been refused, and that the defendants had entered into a private agreement with him to restore his lands whenever he should wish their restoration. In reply, it was urged for the defendants, that their fathers had made the conditional purchase of the lands in dispute in their names in the year 1203 F. S., and that it was stipulated in the deed that the sale should become absolute in the event of repayment not being made within the period of five years; that the sale became absolute accordingly, and that their father having died in 1203 F. S., they succeeded him in possession, which they had ever since retained, with the sanction of the Collector; and consequently that under clause 3, section 3, regulation 2, of 1805, the claim of the plaintiff was not cognizable. The tender of payment by the plaintiff, and the execution of a private agreement by themselves they positively denied.

1820.

Gopaul Lal
and others,
v. Mahara-
ja Pitumber
Sing.

On the 15th of September 1819, the Second Judge of the Patna Provincial Court gave judgment in favour of the plaintiff, on the ground that it had been proved that before the conditional sale became absolute, the amount of the purchase money was deposited in Court, and that the conditional purchasers refused to receive it, notwithstanding the fact of their having been duly informed of the deposit. He considered the case of Bijnath Sahoo *versus* Vizeer Sing (reported as No. 26 of causes decided by the Sudder Dewanny Adawlut in 1806) to be precisely in point, and that the principle of the decision in the one case should guide the decision in the other. He therefore ordered the villages to be restored to the possession of the plaintiff, who was permitted to bring a separate suit for the mesne profits, after deducting the principal and interest of the sum received as purchase money.

On appeal by the defendants to the Court of Sudder Dewanny Adawlut from the above decision, the Chief Judge (Sir E. Colebrooke) gave judgment to the following effect: Pitumber Sing's claim is not properly cognizable under the provisions of clause 3, section 3, regulation 2, of 1805, after a period of more than 15 years has elapsed since the date on which it was stipulated that the conditional sale should become absolute, and the institution of the claim on the part of the plaintiff. It is by no means proved that the plaintiff ever personally tendered payment. The money deposited by Rajah Mitterjeet Sing cannot be held to be the money of Pitumber Sing. It was not deposited on his account, nor intended for his benefit in any way. It was not deposited with a view to save his estate from the conditional sale, but with the view of bringing it to an absolute sale by public auction in satisfaction of the claims of the depositing party, and it was withdrawn by him on his realizing the amount of his debt from another quarter. The case cited by the Second Judge of the Patna Court

1820. as a precedent, and as having been decided by the Court in 1806, is by no means parallel (a) As the transaction between the parties which led to this suit took place before the enactment of regulation 17, 1806, the mortgage must be held to be foreclosed and the conditional sale absolute; nor can the estate now be legally redeemed.

Gopaul Lal
and others,
v. Muldra-
ja Pitumber
Sing.

The Fourth Judge (S. T. Goad) concurring in the above opinion, the decree of the Court below was reversed, and costs of suit in both Courts were made payable by the respondent.

1820.

THE COLLECTOR OF BUNDELKHUND, Appellant,

versus

Nov. 30th.

ILACHEE GEER, Respondent.

The resumption of a rent-free tenure though confirmed by the Board of Revenue, is not valid without the enquiry directed in sections 3 and 4, regulation 8, 1811.

THIS was an action instituted by the respondent, Ilachee Geer, in *formâ pauperis*, in the Benares Provincial Court, against the Collector of Bundelkhund, and three individuals named Futteh, Buljoo, and Sirdha Pande, to recover possession of mouzas Buloocha and Sursinda, in pergunna Rahta, eighteen times the annual produce was estimated at 10,800 rupees.

The claim, as stated in the plaint, was to the following effect: The lands in question were granted to plaintiff's ancestor, Mehunt Mohun Geer, by Hridya Sal and Juggut Raj, the sons of the prince Chuttersal, as a rent-free tenure; since which time hundreds of years have elapsed, and during all that interval every *mehunt* who has successively filled the place of the original donee, has enjoyed the lands without paying any revenue. These lands are the means of supporting upwards of two hundred individuals. Ever since the Company's rule commenced, the predecessor of the plaintiff, Muthooru Geer, was allowed to hold the lands exempt from assessment, and on his death the plaintiff, as the next *mehunt*, succeeded him in the enjoyment of the property. No sooner, however, had the Collector received information from the *tehsildar* of the death of plaintiff's predecessor, than he ordered the lands to be sequestered to the use of Government, and gave a lease of them to the other defendants, on which the plaintiff complained to the Board of Commissioners (b), but could get no redress from that quarter. In reply, it was urged on behalf of the Collector, that agreeably to the rule contained in section 6, regulation 8, 1811, the claim of the plaintiff should be dismissed, inasmuch as it had not been adduced until after six months from the day on which the order for resumption was issued; and that the grant was never intended to convey an

(a) There was one material difference in the case cited which destroyed all analogy between it and the present case. In that suit judgment was given for the mortgagor on proof that offers of clearing the mortgage were made within the term by the mortgagor himself. In this suit the person who made the offer was a stranger to the parties, and wholly unconnected with the transaction.

(b) Now the Board of Revenue for the Central Provinces.

hereditary tenure in perpetuity, as the terms "generation after generation," were not inserted in the Arabic or Sanscrit languages. The other defendants did not appear. On the 9th of July-1818, the Officiating Judge of the Benares Provincial Court gave judgment to the following effect: The plea of the Collector that the plaintiff's claim should be dismissed, from the circumstance of its not having been preferred within the limited period, that is, within six months from the date of the order of resumption, is not entitled to any weight, because the fact is, as proved by evidence, that he actually did prefer his claim within four months and twenty days from the date of the order; but admitting, for the sake of argument, that he had not done so, the omission could not bar his claim. In section 6, regulation 8, 1811, there is the following provision: "Any person who may consider himself aggrieved by the decision which may be passed by the Board of Commissioners *under the rules contained in sections 4 and 5 of this regulation*, shall be at liberty to institute a suit in the courts of judicature against Government to try the merits of the said decision; provided that such suit be instituted within the period of six months from the date on which it may be passed," but in this case it does not appear that the decision of the Board of Commissioners was passed under the rules contained in sections 4 and 5 of the above regulation. On the contrary, it appears to have been passed in direct opposition to those rules. The Collector acted solely upon the information received from the *tehsildar* of the death of the plaintiff's predecessor, and the Board of Commissioners contented themselves with the Collector's report; but in the third and fourth sections of regulation 8, 1811 (a), it is provided, that whenever a Collector shall have reason to believe that any land is held exempt from the public assessment on an invalid or illegal tenure, he shall report the circumstance to the Board of Commissioners, who, should they be of opinion that proper grounds exist for an enquiry, are to direct the Collector to call upon the holder of the lands to adduce any documentary or other evidence tending to establish his right thereto; and that the Collector shall afterwards forward the whole of his proceedings on the subject to the Board of Commissioners, who will then, upon the second information, decide whether the land shall be deemed liable to the public assessment or otherwise. The Collector has not denied that no investigation whatever took place. His plea is, that it could not have benefited the plaintiff to be made acquainted with the intended resumption. There is a distinct admission that positive rules have been infringed, and the courts of justice are bound to protect the rights of private individuals from being injured by disregard to the established regulations. The documentary and oral evidence by the plaintiff, are in the highest degree favourable to his claim. The objection of the Collector that the grant does not contain the terms "generation after generation" in the Arabic or Sanscrit language, is

1820.

The Collector of Bundelkhand,
v. Hachee Geer.

(a) Although this regulation has been rescinded by section 2, regulation 2, 1819, yet the provisions of these clauses have been in substance re-enacted by the several clauses of section 5 of the latter regulation.

1820. frivolous, particularly in the present case of a grant made to *Fakeer Gosains*, where it would be inappropriate to have made use of

The Collector of Bundelkhand, v. Hachee Gver.

such terms; for among this class of men the succession does not go by birth, the son does not succeed the father, but the *chela* or disciple succeeds the *gooroo* or spiritual priest. It was evidently the intention of the grantors that the tenure should descend to every succeeding *Mehunt* in evidence of which the grant contains the words *hur humeish* (for ever) which, though neither in the Arabic nor Sanscrit language, certainly signify perpetuity. The Courts are bound to attend not merely to the terms but to the spirit and intent of deed. Judgment was accordingly given for the plaintiff with costs.

The Collector being dissatisfied with the above decision, appealed to the Court of Sudder Dewanny Adawlut, but no new pleas having been urged, and the Fourth Judge (S. T. Goad) being of opinion that those advanced in the Court below had been satisfactorily overruled, the decree of the Patna Court was affirmed, and the costs of appeal made payable by the appellant.

1820.

SHUMSHEER ALI KHAN, Appellant,

versus

Dec. 11th.

MUSSUMMAUT WILAYUTEE BEGUM, Respondent.

The heirs of a Moosulmaun, being his widow and three daughters, the estate should be made into 24 parts, of which the widow takes an eighth or 3, and the three daughters 7 each.

THE appellant, who was the plaintiff in the City Court of Moorshedabad, sued for possession of the talook of Plassey, situate within that jurisdiction, formerly the property of Ruzia Begum, the wife of Hajeer Moohummud Ali. The annual produce was estimated at 3,225 rupees. It was agreed by both parties, that the said Begum had become entitled to the whole of her husband's property, in consideration of dower, in lieu of which it had been conferred on her by him, and the claim of each was alleged to have been derived from her; the plaintiff claiming in virtue of inheritance, and the defendant in virtue of gift. This Ruzia Begum was the plaintiff's father's sister, and the defendant's father's wife. The Judge of the City Court being of opinion that the deed of gift set up by the defendant was a genuine and authentic instrument, and having learnt from his law officer that such gift might be valid even though a brother's son of the donor was living, he dismissed the claim with costs. On appeal to the Provincial Court of Darca, the Third Judge, for the reasons stated in his decree, came to the same conclusion as to the deed of gift under which the respondent claimed, and deeming the claim of the respondent to be entitled to preference, the appeal was dismissed with costs.

The appellant being still dissatisfied, presented a petition to the Sudder Dewanny Adawlut for the admission of a special appeal, which was allowed on the ground of an opinion delivered by the law officers to the following effect: If a woman dispose of certain immoveable property by gift, and subsequently, the donor herself, until the day of her death, continue in possession of the thing given, and the donee during the life time of the donor never

made seizin, the gift is void in law; unless the donee be a minor child of the donor, or of some other person, and living in the house and under the protection of the donor, in which last mentioned cases the seizin of the donor is equivalent to that of the donee. It appearing that Ruzia Begum had never resigned possession of the property given, to the day of her death, and that the respondent was not a minor, the case seemed deserving of some further consideration. After an attentive perusal of all the proceedings and documents in the suit, the Fourth Judge recorded his opinion that the authenticity of the deed of gift under which the respondent claimed had by no means been proved, and that admitting it to have been proved, still it was void and of no effect according to the Moohummudan law, as the property it purported to convey had not gone out of the possession of the donor, or been put into that of the donee, and consequently that the decrees of the Courts below should be reversed. The Officiating Judge (C. Smith) concurred in this opinion as to the propriety of reversing the decisions of the Courts below; but it not being in his judgment satisfactorily proved that Hajee Moohummud Ali had made over his property to his wife in lieu of dower, he recorded his opinion that the estate left should not devolve on the heirs of Ruzia Begum alone, but on those of her husband Hajee Moohummud Ali; and that it should be made into twenty-four shares, of which twenty-one shares, or seven each, should be taken by Uleenonisa, Hukeema Beebee and Wilayutee Begum (respondent), the three daughters of that individual, and that three shares should be taken by the appellant as the eighth, or widow's share, of his paternal aunt Ruzia Begum (a).

This order, however, was not ultimately issued, as the Chief Judge (Sir E. Colebrooke) concurred with the Fourth Judge in opinion that the property of Hajee Moohummud Ali had been duly made over to Ruzia Begum, of whom the appellant was the sole heir. The decrees of the Courts below were reversed accordingly, and the costs of all three Courts were made payable by the respondent.

1820.

Shumsheer
Ali Khan.
v. Moohum-
mud Wil-
ayutee Be-
gum.

RANEE BUKHSH BEEBEE, Appellant,

1820.

versus

NADIR BEEBEE, Respondent.

Dec. 11th.

THE respondent, Nadir Beebee, sued the appellant, *in forma pauperis*, in the Zillah Court of Ramgurh, on the 5th of August 1813, to recover possession of forty-four out of two hundred and thirty-six mouzas situated in pergunna Shurhurghatee, the estate of the late Rajah Gholam Hoosein Khan. The plaint set forth, that Gholam Hoosein died leaving a son, Imam Bukhsh, and a daughter, Qaim Beebee, by his wife Oomda Beebee, and a son, Ali

The heirs of a Moosulmaan being his widow, two sons and four daughters, the estate should be made into 64 parts, of which the appellant was entitled to one-sixth, and the respondent to five-sixths.

(a) Where a wife inherits from her husband, leaving children, her share in that case being one-eighth, and there are other claimants entitled to one-sixth, one-third or two-thirds, the divisions must be by twenty-four.—See *Principles and Precedents of Moohummudan Law*, page 13, §§ 66.

1820.

widow is entitled to 8, the sons to 14 and the daughters to 7 each; and being his mother, his widow and three sisters, should be made into 39, of which his widow is entitled to 9, his mother to 6, and his sisters to 8 each.

Bukhsh, and three daughters, Sanih Beebee, Niamut Beebee, and the plaintiff, by his wife Butasoo Rane; that the two sons got possession of the whole of the property left by their father and enjoyed it exclusively, and that whenever the plaintiff applied to them for her share they promised to put her in possession as soon as the incumbrances were cleared off the estate, and the Government revenue paid up punctually; that Qaim Beebee formerly sued Ali Bukhsh (who defended himself as well on his own account as on account of the minor sons of his deceased brother Imam Bukhsh) for the amount of the dower due to her mother, Oomda Beebee, and obtained a decree partly in right of that dower and partly in right of inheritance, for a third of the estate left by Gholam Hoosein, which third has since been separated and is now in the possession of her son Mookurrib Khan and her daughters; and as the share of Imam Bukhsh inherited by his sons Qadir Bukhsh and Hoosein Bukhsh has been sold by public auction, and as Ali Bukhsh is dead, the plaintiff now sues his widow who has got possession of his share, and who obstinately refuses to surrender the share legally due to the plaintiff.

The defendant at first demurred to the plaint as irregular, and confounding two distinct claims which ought to have been preferred separately, the one involving the right of inheritance to a brother and the other to a father. She afterwards, however, pleaded that the third share of the estate which had devolved on her from her late husband was considerably encumbered with debts which had accrued in the time of the original proprietor; that her late husband had paid 29,500 rupees of the debt, and she herself 6,595 rupees, that the sum of 44,016 rupees was due to her (the defendant) on account of dower, and that the estate was still chargeable with no less a sum than 106,397 rupees; that she herself had been obliged to contract heavy debts, from the fear of participating in which the plaintiff had hitherto delayed to assert her claim. The defendant, in conclusion, urged the propriety of taking the opinion of the law officer as to whether the payment of debts did not legally precede the satisfaction of the claims of inheritance. The plaintiff rejoined, that the allegations of the defendant were entirely false and unfounded, and that she was perfectly ready, on the establishment of her claim, to take upon herself the responsibility, in proportion to her share, of all claims of debt that had been or might be preferred against the estate. The Judge of Zillah Ramgurh deeming it necessary to consult with his Mooftee in this case, put to him the following questions: first, Rajah Gholam Hoosein Khan, zemindar of pergunna Shurlurgate, died leaving a widow Mussumant Butasoo Rane, two sons Raja Imam Bukhsh, and Rajah Ali Bukhsh, and four daughters Qaim Beebee, Sanih Beebee, Niamut Beebee, and the plaintiff. Under these circumstances, to how much of the property left by him, is the plaintiff entitled? and to how much is Ali Bukhsh entitled? And afterwards, when Ali Bukhsh died and left as his heirs, his mother, Butasoo Rane, his widow, the defendant, his three whole sisters, Sanih Beebee, Niamut Beebee, and the plaintiff, his half sister, Qaim Beebee, and two sons of his half brother named Qadir Bukhsh and Hoosein Bukhsh, in these two cases, how much in right of her father, and how much in

right of her brother, will devolve on the plaintiff? Secondly, the state of the family being as above described, supposing one of the heirs, Qaim Beebee, to have succeeded by a decree of the Sudder Dewanny Adawlut to one-third of the estate in virtue of the dower due to her mother Mussumaut Oomda Beebee, and in virtue of her share as daughter, and of the two-thirds remaining, one to have devolved on the widow of Ali Bukhsh (the defendant) and the other on the two sons of Imam Bukhsh, and this last share to have been sold by public auction, under these circumstances, is the third share held by the widow to be distributed among the heirs of Gholam Hoosein, and subsequently the share of Ali Bukhsh among his heirs as enumerated in the former question; and if so to how much of such third share will the plaintiff be entitled as heir of her father Gholam Hoosein and of her brother Ali Bukhsh? In reply, the Mooftee delivered the following opinion: The whole estate left by Gholam Hoosein Khan should be made into sixty-four shares, of which eight parts are the right of Beebee Butasoo, his widow, fourteen parts each the right of his sons, Imam Bukhsh and Ali Bukhsh, and seven parts each the right of his daughters, Qaim Beebee, Sanih Beebee, Niamut Beebee and the plaintiff. On the death of Ali Bukhsh his estate, which consisted of fourteen parts out of the whole, should be made into 39 parts (a), of which nine shares are the right of his widow (the defendant, Bukhsh Beebee) and six shares the right of his mother, Butasoo Beebee, and eight shares each the right of Sanih Beebee, Niamut Beebee and the plaintiff, his three whole sisters; but his half sister and the sons of his half brother are not entitled to any portion of the property left by him. It consequently appears from the above calculation, that the plaintiff is entitled altogether to a two ana, nine dam, seven cowrie share of the estate. In reply to the second question, he observed, that it would be sufficient to deduct fourteen parts, the share of Imam Bukhsh, and seven parts, the share of Qaim Beebee from the number (sixty-four) into which it would have been necessary to make the estate had they shared, after which deduction there would remain forty-three parts, of which eight shares are the right of his widow Butasoo, fourteen shares the right of Ali Bukhsh, and seven shares each the right of Sanih Beebee, Niamut Beebee and the plaintiff. On the death of Ali Bukhsh, his estate, which consisted of fourteen parts out of the third share of

1820.

Ranee
Bukhsh
Beebee, v.
Nadir Bee-
bee.

(a) The property of Ali Bukhsh should originally have been made into twelve parts, as where a wife inherits from her childless husband, her share in this case being one-fourth, and there are other claimants entitled to one-sixth, one-third, or two thirds, the division must be by twelve. (See *Principles and Precedents of Moohummudan Law*, page 13, §§ 65,) but after one-fourth or three has been deducted for the wife's share, and one sixth or two for the mother's, it will be found that there do not remain two-thirds for the sisters. Consequently the number twelve must be augmented to thirteen, by the process called the *engrase* (see pages 14 and 22, *Ibid*) but even thirteen will be found insufficient, for, after six shall have been deducted, there will remain seven for the three other sharers, which cannot be distributed among them without a fraction, but the shares and the sharers being prime, recourse must be had to the third *principles of distribution* (see page 15, *Ibid*.) under which rule the estate of Ali Bukhsh should have been made into thirty-nine parts, thirteen, the number of shares, being multiplied by three, the number of sharers who cannot get their portions without a fraction.

1820. the original estate should be increased to thirty-nine, and distributed among his heirs in the same proportion as formerly. Consequently the plaintiff is entitled altogether to fifteen shares; to seven out of forty-four left by her father, and to eight out of thirty-nine left by her brother. The Zillah Judge recorded his opinion, that although agreeably to the principles of the Moohummudan law, the payment of debts precedes the claims of inheritance, yet it did not follow that the plaintiff should be deprived of the possession of her share of the third of the estate left by her father and brother until she had paid her proportion of the debts that had accrued upon it. She was declared, however, to be liable for her proportion of the debts which had accrued during the possession of her father and of her brother, but not for those which had accrued since the possession of the defendant. It appearing that the plaintiff was entitled to a 3 ana, 13 dam, 9½ cowrie share of the estate in the possession of the defendant, immediate possession of that share was awarded to her accordingly.

Ranee
Bukhs
Beebee, v.
Nadir Bee-
bee.

In appeal to the Patna Provincial Court, the defendant pleaded her right to the entire estate left by her husband in satisfaction of dower, but the Second Judge of that Court being of opinion that the claim to dower being distinct and unconnected with the present case, should be brought forward in another suit, and not attaching any weight to the other pleas of appeal, affirmed the decree of the Zillah Judge on the 23d of February 1818.

A special appeal having been preferred and admitted from the above decisions to the Court of Sudder Dewanny Adawlut, the legal opinion delivered by the Mooftee of the Zillah Court was made over to the law officers, Moohummud Rashid and Hamid Oollah, who were desired to state whether or not the exposition it contained was correct. It appearing from their reply, that the distribution of shares as indicated by the *futwa* of the zillah law officer was just and proper, the decrees of the Courts below were affirmed by the Officiating Judge (C. Smith), and the appeal dismissed with costs. (a)

(a) Although the *futwa* of the law officer of the Zillah Court was so far correct that it did not operate unjustly in respect to any of the heirs, yet, as it did not appear that any distribution of the property had taken place until after the death of Ali Bukhs, the *futwa* ought to have been delivered according to the rules prescribed in a case of vested inheritance. This observation was made by the law officers of the Sudder Dewanny Adawlut, but as it appeared that by this mode of calculation the result would be in substance the same, no further notice was taken of the omission. For the rules to be observed in cases of vested inheritance, that is, where a person dies and leaves heirs, some of whom die prior to any distribution of the estate; See pages 27 and 28, *Principles and Precedents of Moohummudan Law*.

MEER SHEER ALI, and RAJAH SHEOLAL DOBE, Appellants, 1820.

versus

SHEIKH LOOTF ALI, Respondent.

Dep. 12th.

THIS action was instituted on the 4th of February 1810, in the Benares Court of Appeal by Sheikh Lootf Ali, against the Collector of Benares, Meer Sheer Ali and Sheolal Dobe, to obtain the reversion of the sale of talook Shumspoor and mouza Dhangeepoor in pergunna Oonglee, the annual *jumma* of which was stated at 2,190 rupees; and to be allowed a deduction annually of 700 rupees on account of the produce of 277 beegas from the year 1204 to the year 1214 B. S., total claim 7,700 rupees. Lands separately assessed having been publicly sold in the same lot the sale was set aside as illegal.

The plaintiff set forth, that the lands in dispute were the plaintiff's hereditary property; that he obtained a settlement for the talook at an annual *jumma* of 2,040 rupees, and for the mouza at 150 rupees; and accordingly paid the revenue of both with punctuality; that from the year 1204 B. S. certain Oude zemindars forcibly took possession of 277 beegas of the lands, at the instigation of Sheolal Dobe; that on the 21st of September 1807, the Collector issued notice for the sale of the plaintiff's lands, on the ground of an alleged balance of 5,777 rupees, which the *tehsildar* (Sheolal Dobe) reported to be due from him; that the plaintiff obtained an order of Court for the postponement of the sale, which was nevertheless carried into effect by the Collector in defiance of that order, and the lands were purchased nominally by Meer Sheer Ali, but in reality for the use and benefit of Sheolal Dobe, of whom the former was the mere tool.

The Collector in reply, stated that the sale of the plaintiff's lands had taken place by public auction in a fair, legal, and regular manner, and that the reason of its not being postponed was the inability of the plaintiff to furnish security for the payment of the balance which had accrued on the estate. The other defendants denied the collusion imputed to them, and Sheolal Dobe contended that, even admitting the transaction of the purchase to have been fictitious, as alleged, still that was no reason for reversing the sale. It could only operate to create a forfeiture of the lands to Government agreeably to section 29, regulation 7, 1799.

It appeared on investigation, that the lands of the plaintiff had been put up to public sale for balances which had accrued from the year 1209 to the year 1214 B. S., and that in the year 1810, a *Suzawul* had been sent to take possession and to collect the rents; consequently the plaintiff could not be answerable for the collections during all this interval, and that the collections were not regularly and punctually made depended solely on the report of the *tehsildar*, Sheolal Dobe, who was unable to furnish any evidence of the truth of the allegation. In point of fact, therefore, the lands were sold for the balance of 1,209 rupees, a measure which was clearly unnecessary; although the plea of the plaintiff that part of his estate had been wrested from him was inadmissible, inasmuch as the auction purchaser had regularly paid

1820. the rents, and had never come into possession of more lands than had been held by the plaintiff. It appeared also to the Officiating Judge of the Court of Appeal, that a gross irregularity had taken place in conducting the sale. The talook of Shumspoor, and the mouza of Dhangeepoor had been separately and distinctly assessed, and had continued so to the very day of the sale; and yet the Collector had, in contravention of the rule contained in the third section of regulation 5, 1796, (extended to Benares by regulation 5, 1800) exposed them both for sale in one lot. On this ground alone the Judge, was of opinion that the plaintiff was entitled to have a decree in his favour; independently of which, there seemed ample ground for suspecting collusion and underhand practices between the nominal purchaser and the *tehsildar*. On the above grounds, the sale was ordered to be reversed, and the plaintiff declared entitled to recover possession of his estate at the *jumma* for which the settlement was originally made; Rajah Sheolal Dobe, the *tehsildar*, was at the same time instructed, that he was at liberty to prefer an action against the plaintiff for the recovery of any balances that might have accrued between the years 1209 and 1214 B. S.; but that, under the circumstances of the case, he was not authorized, without obtaining a decree, to expose the lands for sale by public auction. Sheolal Dobe, on the ground of his having fraudulently caused the sale, was further desired to make good to the auction purchaser the sum of 5,001 rupees, the price paid by him for the lands, and also to pay the costs of all parties. The plaintiff was declared at liberty to bring a fresh action for the recovery of mesue profits. The deductions claimed by him were disallowed.

Meer Sheer Ali being dissatisfied with the above decision, appealed to the Court of Sudder Dewanny Adawlut, and Sheolal Dobe subsequently presented a petition, praying that he might be included in the appeal, which was complied with, he being dissatisfied with the order which rendered him liable for the costs of all the parties in the suit. When the cause came to a hearing, the Fourth Judge (S. T. Goad) being of opinion that the decree of the Court below, was, for the reasons therein stated, in every respect just and proper, affirmed it accordingly. The costs incurred in the Sudder Dewanny Adawlut were made payable by the appellants, in the proportion of their respective interests in the appeal.

THE COLLECTOR OF MOORSBEDABAD, Appellant, *

1821.

versus

LALLA SOHUN LAL, Respondent.

Jan. 3rd.

THIS was a suit instituted in the Moorshedabad Provincial Court, on the 3d of May 1813, by the Collector of the above zillah, to recover 10,451 rupees, 14 anas, on account of money embezzled, by the late Lalla Dhurumnarain, stamp *darogha* in the Collector's office.

The surety of a native officer, employed under a Collector, is not liable to make good a defalcation discovered after the death of such native officer.

The plaintiff set forth, that the defendant was the security for Lalla Dhurumnarain (who died on the 7th* of April 1813,) on his appointment to the situation of stamp *darogha* in the Moorshedabad Collector's office, and that, on his death, the defendant, in conformity to an order from the Collector, appeared and examined the stamp office, when a defalcation to the above amount was discovered, for the payment of which the defendant, as surety for Lalla Dhurumnarain, was responsible. This was the ground of the suit.

The defendant, in reply, denied that he had become security for the payment of Dhurumnarain's debts, and stated that when that individual was appointed stamp *darogha*, he (the defendant) was in the service of Nuwab Shahamut Jung, by whose orders he had proceeded to Calcutta, and that Sohun Lal was also the name of Dhurumnarain's brother, who might perhaps have entered into security for the *darogha*. The defendant further contended, that the plaintiff was irregular, inasmuch as it did not state in what year this defalcation occurred, nor whether it was for a single year or for several years.

On the 21st of June 1816, the Senior Judge of the Provincial Court decided against the claim, observing, that although the plaintiff had brought this action stating the sum claimed as due from the late Lalla Dhurumnarain, and had produced the surety bond, purporting to be signed by the defendant, yet the quantity and value of the stamps entrusted to the care of the *darogha* were not mentioned in the plaintiff, neither did it appear how much money and stamp paper, and of what value, had been recovered, so as to leave the above deficit; that from the surety bond it did not appear under what regulation Dhurumnarain had given security; that it was not satisfactorily proved by the depositions of the witnesses or the other papers of the case, that the defendant was the identical person who entered into security for Dhurumnarain, and executed the bond; but that even if this had been the case, the defendant, according to the 16th section of regulation 3, 1794, would not be liable to make good any sum due by the deceased, because the above regulation expressly declares that in the event of the death of any officer on the Collector's establishment, who may have given security agreeably to that regulation, the surety is to be exonerated from all responsibility, and the Collector is to proceed against his heirs by a regular suit in the Court to which they may be amenable for any claims which Government may have upon the deceased, and that it appeared in evidence that the Collector had, in fact, on his death, sold the property of Dhurumnarain, and received the proceeds of it.

1821.

The Col-
lector of
Moorshe-
dabad, v.
Lalla So-
hoo Lal.

The plaintiff appealed to this Court, and the cause came to a hearing before the Officiating Judge (C. Smith), who observed that the security bond, dated 29th of *Jeyt* 1212, B. S. appeared to have been executed according to regulation 3, of 1794, by Sohun Lal the respondent, but that as no exception appeared to have been taken against Lalla Dhurumnarain, the principal, during his life time, for the mode in which he conducted the duties of his office, his surety would, even if the defalcation on his part were fully proved, be exonerated from all responsibility, agreeably to the rules contained in the enactment above quoted. He therefore dismissed the appeal with costs, and affirmed the decree of the Provincial Court.

1821.

Jan. 16th.

MUNOHER LAL, Appellant,

versus

RAMNARAIN GHOSE, Respondent.

Part of a
debt hav-
ing been
realized by
the process
of the Su-
preme
Court, and
the action
there hav-
ing been
discontin-
ued, it is still
competent
to the com-
plainant to
sue for the
remainder
in a Provin-
cial Court,
though the
claim to be
reimbursed
for costs of
suit incur-
red in the
former
Court will
be rejected.

THE respondent brought this action on the 4th of February 1809, in the Zillah Court of the twenty-four pergunnas, against the appellant to recover 6,119 rupees, 14 anas, 15 gundas, principal and interest.

The plaintiff set forth, that Messrs. Perreau and Stephens, merchants and agents, who resided in Calcutta, drew a bill, bearing date the 4th of February 1799, for 5,000 rupees, on Mr. Prager payable at the end of three months; that the bill was duly accepted by the drawee, that the defendant indorsed it on the 11th of February, and received the amount of it from the plaintiff; that at the expiration of that period the drawer, the drawee, and the endorser above named, all absconded to Serampore, to avoid paying the money, upon which the plaintiff sued them all in the Supreme Court, caused a great part of their property to be attached and sold, and recovered the sum of 3,275 rupees, 15 gundas; after deducting which from the amount of the bill, and allowing 576 rupees, 14 anas, for expences, costs and charges in the Supreme Court, and 98 rupees, 4 anas, and 10 gundas, for the expences of the sheriff's officer, there is a balance of 5,696 rupees, 2 anas, and 10 gundas, in favour of the plaintiff, due to him by the defendant, which, with interest from the time the note was due, amounts to 6,119 rupees, 14 anas, and 15 gundas, the sum now claimed; and as the defendant is living in mouza Belsingha, in this zillah, and refuses to pay, the plaintiff has now instituted the suit against him. At this stage of the proceedings all the papers filed in the cause in the Zillah Court were transferred, according to the 13th regulation of 1808, to the Calcutta Provincial Court.

The defendant, in reply, denied having borrowed any money from the plaintiff, and stated that Mr. Perreau, who was a merchant in Calcutta, became insolvent and absconded, and is now in the Company's employ at Penang; that he (the defendant), who was in the above gentleman's service, as a writer, became insolvent also, disposed of his property in mouza Belsingha, and of his ta-

looks, &c. and paid a great part of his debts; but as the proceeds arising from the sale of his property would not cover all his debts, he was forced to retire to Serampore; that the plaintiff had deducted 460 rupees, 6 anas, from the amount of the note, as discount and interest in advance, which was contrary to the 9th section of regulation 15, 1793: that no regulation authorized the plaintiff to institute this suit solely against him, although the abovementioned gentleman was alive; that the plaintiff, conscious of having acted illegally in having received interest and discount in advance, went several times to Serampore and agreed to take 3,750 rupees in full of all demands, and received a draft for 1,880 rupees of that sum on Lukee Kanth Burhal, and a draft for the rest on other persons. On the 21st of May 1813, the plaintiff was nonsuited in the Provincial Court, under section 12 of regulation 3, 1793, it appearing to the Senior Judge that he had brought an action in the Provincial Court whilst he had a suit pending in the Supreme Court in the same matter. On appeal to the Sudder Dewanny Adawlut, the above order was reversed, and the Provincial Court were instructed to try the case *de novo*, and decide it on its merits; for although the propriety of refusing to hear a claim which was still pending in the Supreme Court was fully recognized, yet it appeared in point of fact, from a certificate of the Prothonotary, that the claimant had there discontinued his action. It appeared also that the defendant had landed property in the zillah of Hooghly. The case came to a hearing again before the Provincial Court on the 25th of February 1818, when judgment was delivered to the following effect:

1820.

Munohar
Lal, v.
Rajnarain
Ghose.

On the 4th of February 1799, Messrs. Perreau and Stephens drew a bill payable at the end of three months for 5,000 rupees on Mr. Prager in favour of the plaintiff, which was endorsed by the defendant on the 11th of the same month, and delivered to the plaintiff, and the amount of the bill was received from him; the plaintiff has at different payments received 3,275 rupees, 6 anas, 15 gundas, out of the above sum, but the balance has never been paid: the defendant's allegation, that the plaintiff had agreed to cancel the debt on the payment of 3,750 rupees, and that he (the defendant) had once remitted through Lukee Kanth Burhal, the sum of 1,880 rupees, and the remainder through other persons, cannot be credited; inasmuch as if any settlement had been made between the parties, some kind of document would be forthcoming, or the defendant would have produced a receipt from the plaintiff acknowledging payment in full: the evidence of the witnesses called by the defendant does not prove any settlement of accounts between him and the plaintiff, nor the payment of any thing besides 1,880 rupees, through Lukee Kanth Burhal, which the plaintiff had himself allowed; the plaintiff has however, in his claim, reckoned compound interest, which is contrary to section 7, regulation 15, 1793, and cannot be sanctioned; the sum of 576 rupees, 14 anas, mentioned by the plaintiff in his claim, on account of expences in the Supreme Court, cannot be decreed, as this Court has nothing to do with the Supreme Court, neither can the other contingent expences included in the claim, as the plaintiff has not produced any vouchers in support of them; as this is a dispute of old date

1820. the interest of the original sum of 5,000 rupees has exceeded the principal, and the interest on the sum of 3,275 rupees, received by the plaintiff, has also exceeded that sum. It seems therefore equitable to decide the case according to the *Gunga Jumna* (a) principle. The Court therefore awarded to the plaintiff 5,000 rupees principal, and the same sum interest, after deducting from it the sum of 3,275 rupees received from the defendant, and interest to the same amount; and allowed the plaintiff to receive interest on the sum of 5,000 rupees principal, from the date of the suit, viz. 4th of February 1809, till payment should be made, or until the interest equalled the principal. On appeal to this Court, there appeared no good reason for altering the decision of the Provincial Court, which was accordingly confirmed; and the appeal by the Second Judge (Courtney Smith) dismissed with costs.

Munohar
Lal, v.
Ramnarain
Ghose.

1821.

MOHUNT RUNJEET GEER, Appellant,

versus

Feb. 12th.

KUNHYA LAL and others, Respondents.

Held that the institution of a suit for the recovery of a debt before the time specified for payment, is not a sufficient ground for depriving the creditor of interest after the debt has become due; though sufficient for the refusal of costs or for nonquit.

* THE appellant brought this action on the 31st of January 1810, against the respondents and one Gomtee Geer in the Mirzapoor Zillah Court, to recover 1,999 rupees principal and interest, on account of a loan, with interest thereon, from *Aughun* to the 6th of *Mugh* of the year 1866 *Sumbut*.

The plaintiff set forth, that Gomtee Geer induced the plaintiff to advance the above sum to the defendants, Kunhya Lal and Rampershaud, by agreeing to become security for the payment of it; but that those defendants had failed in business, and payment was withheld both by them and by their surety.

The defendants, Kunhya Lal and Rampershaud, stated in reply, that before their business failed, Debee Churun, the plaintiff's *gomashta*, came to their house, settled the accounts between them, and took a bond for the sum now claimed; for the payment of which, at the end of two years, they then mortgaged their dwelling-house. Five days after this transaction, the plaintiff instituted the present suit, which is contrary to the customs of trade, and the regulations of Government, and therefore ought not to be allowed; for the 8th section, regulation 17, 1806, declares that "the Judge on receiving petitions in cases of this nature shall cause the mortgager, or his legal representative, to be furnished with a copy of it, and shall at the same time notify to him by a *purwana*, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing regulation, within one year from the date of the notification, the mortgage will be foreclosed, and the property

(a) This mode of adjusting accounts was, until lately, almost exclusively confined to the Western Provinces. It consists in allowing the creditor interest on the original debt until the whole is liquidated, and the debtor interest at the same rate on his several instalments.

told ;" whereas the plaintiff had maliciously brought this action and ruined their trade and character, although they (the defendants) were willing to pay the debt within the term specified. 1829.

The defendant, Gomtee Geer, replied, that the plaintiff had represented in his petition that the other defendant had contracted the debt through his (Gomtee's) means; but as the plaintiff had made a settlement of accounts, and had taken a fresh bond, for the payment of which the other defendants dwelling-house had been mortgaged, he had nothing further to do with the matter, and the present suit did not affect him. Mohunt Runjeet Geer, v. Kunhya Lal and others. •

On the 11th of May 1811, the Judge being of opinion, for the reasons stated in his decree, that the deed of mortgage mentioned by the defendants was informal, and that the plaintiff's claim was just, from the admissions of Kunhya Lal and Rampershaud, that the above sum was due to him from them, and for the payment of which Gomtee Geer had also acknowledged that he had become security, passed a decree in favour of the plaintiff, ordering Kunhya Lal and Rampershaud to pay the amount of the claim with costs; and in case of their failing to do so, directing the sale of the house (which had come under attachment by the Court) and the proceeds to be given to the plaintiff, and if the money thus realized should prove insufficient to liquidate the whole of the debt, making Gomtee Geer liable to the payment of the deficiency.

From the above decision, Kunhya Lal and Rampershaud appealed to the Benares Provincial Court, as paupers; and on the 26th of November 1814, the Judges of that Court observed, that the paper executed by the appellants in favour of the respondent was not a regular deed of mortgage, but a simple obligation; which declared, that if the money was not paid in two years the house therein specified should be sold and payment made; that the respondent had admitted that he caused the appellants to execute the above deed for the purpose of securing the amount of the debt, and although he alleged that the deed did not partake of the nature of a mortgage, yet it was evident from his keeping it for five days, that he had consented to it, and was satisfied with the security which it afforded; and therefore that the institution of this suit before the expiration of two years was contrary to the provisions which it contained. But as the appellants had in that Court allowed the justice of the claim, and as more than two years had elapsed above the period specified in the obligation, and as the appellants statement that their business had failed in consequence of the respondents act, had not been proved, they were of opinion that the amount of the claim ought to be paid by the appellants, and the Zillah Court's decree confirmed, and that Gomtee Geer was still responsible, notwithstanding the obligation of the principals. As the respondent, however, had sued without any actual default on the part of the appellants, it would be unjust to make them pay costs and interest from the date of the zillah decree. They therefore ordered the appeal to be dismissed, the zillah decree to be affirmed, and the respondent to pay the costs of both Courts.

The present appellant preferred a petition for a special appeal to this Court against the Provincial Court's decree, on the ground of its not having awarded him interest on the amount decreed in

1821.

Mohunt
Runjeet
Geer, v.
Kuahya
Lal and
others.

his favour in the Zillah Court, and of his having been ordered to pay costs, which appeal was granted, and the case came to a hearing before the Fourth Judge (S. T. Goad) who recorded his opinion that the circumstance of the respondents having instituted this suit before the expiration of the period specified in the obligation, was not a sufficient reason for the refusal of interest as allowed by section 3, regulation 13, of 1796, but warranted the refusal of costs, and would have justified the dismissal of the suit. He therefore with the concurrence of the First Judge (W. Leycester) ordered the decree of the Provincial Court to be amended, awarded the appellant interest on ₹,999 rupees, at the rate of twelve *per cent per annum* from the date of the zillah decree, and made the costs of this Court payable by the respondents.

1821.

KISHNANUND CHOWDREE and others, Appellants,

versus

Feb. 15th.

•MUSSUMMAUT ROOKUNEE DIBIA, Respondent.

A widow (Hindoo) has no claim upon her step-grandson or her step-son's widow for maintenance, while she has a step-son living, who alone is bound to maintain her, even though the others are in joint possession with him of her husband's estate.

THIS was a suit instituted by the respondent against the appellants in the Rungpore Zillah Court, on the 29th of May 1813, to recover 510 rupees *per annum* on account of maintenance.

The plaintiff set forth, that on the death of Ramchunder Chowdree (the plaintiff's husband) his own brother Ramanund Chowdree entered upon the hereditary estate of, pergunna Minpoor, as well as turuf Ramchunderpoor and other mehals, which had been purchased with the profits of the above pergunna, in the name of Kishenchund Chowdree, the plaintiff's step-son, and punctually paid the public revenue, maintaining all the members of the family; that afterwards, at the instigation of Hurischund and Kishnanund, who were also the plaintiff's step-sons, Kishenchund, with the consent of the parties, drew up a deed of partition, allotting a seven ana share of the estate to Ramanund Chowdree, a four ana, five gunda share to himself (Kishenchund), and a two ana seven and half gunda share each to Hurischund and Kishnanund; and they obtained separate possession of their respective portions; that as the plaintiff had no children of her own, her three step-sons Kishenchund, Hurischund and Kishnanund allowed her a maintenance; that after the death of Kishenchund, when the plaintiff was going to sue for the payment of her maintenance, which had been suspended, Jydoorga (Kishenchund's widow) and Hurischund and Kishnanund prevented her, and entered into an agreement to pay it, and did for two years allow her a small sum, but ultimately refused to continue to her any provision; that as Jydoorga and Kishnanund and Bhyrochund (after the death of his father Hurischund) enjoyed her husband's nine ana zemindaree, and derived large profits from it, the plaintiff being deprived of subsistence, now sued to be allowed a stipend to defray the expences of food and raiment.

Jydoorga Dibia and Kishnanund Rai, in their replies, stated that the plaintiff had lived with them for 25 years, but separated

in the year 1215 B. S., and had since received a monthly allowance of eleven rupees for her maintenance, although the sum of seven rupees and a half was amply sufficient for that purpose; and that the present suit was wholly groundless, and had been instituted at the instigation of, and in collusion with Ramanund, to defraud the other heirs. The defendant, Bhyrochund, suffered judgment to go by default.

1821.
Kishna-
nund
Chowdree
and others,
v. Mussum-
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On the 15th of June 1816, judgment was given in the Zillah Court in the following terms: From the answer of the Pundit of the Court it appears that the plaintiff is not entitled to any thing as a share, but she has a right to a certain proportion of the profits of the estate, for the purpose of defraying the charges of food and raiment and of performing the exequial ceremonies of her late husband. In her petition the plaintiff claims 510 rupees *per annum* for these purposes, and the defendants in their reply state that they allowed her 11 rupees *per mensem*. In the account of disbursements produced by the plaintiff, she has estimated her expenditure at the rate of 50 rupees *per mensem*, which exceeds the amount of the sum claimed in the plaint, and is disproportioned to the husband's estate, as there are two other wives besides the plaintiff, who also have a great many relations, and the zemindaree is incapable of paying a like sum to them. Several of the items stated to be requisite are rated exceedingly high, and some of the articles of food mentioned as being necessary are forbidden by the *shasters* to Hindoo widows. The surviving brothers and the heirs in possession of the two deceased brothers shares, however, should contribute, each in proportion to his interest, to the payment of 40 rupees *per mensem*, or 480 rupees *per annum* to the plaintiff, after deducting the sum of 25 rupees, which appeared from the receipts of 1219 B. S. to have been already paid; but as no sum had been before settled and agreed on for maintenance by the parties, they should be answerable for their respective costs.

The defendants appealed against this decision to the Moorshedabad Provincial Court, and on the 22d of July 1818, the First Judge, finding from the *vyuvustha* of the pundit of the Court that the respondent was entitled to maintenance at the rate of only 11 rupees *per mensem*, was of opinion that the zillah decree ought to be amended; but in consequence of a difference of opinion between the pundits of the Zillah and Provincial Courts, as to the right of the widow to perform the *sraddha* of her deceased husband, the two *vyuvusthas* were transmitted to the Sudder Dewanny Adawlut for the purpose of obtaining the opinion of the pundits of that Court as to their relative accuracy. The *vyuvustha* of the pundits of the superior Court coincided with that of the zillah law officer, in declaring that a widow without children had a right to perform the funeral obsequies of her husband, in addition to her right of maintenance; that no sum was fixed by the law for a widow's maintenance, but that she was entitled to such an allowance as might be proportionate to the property left by her husband. The case came to a hearing again on the 17th of February 1819, before the Third and Officiating Judges, who were of opinion that the zillah decree

1821.

Kishna-
nund
Chowdree
and others,
v. Mussum-
maut Roo-
knee Di-
bia.

ought to be affirmed, and it was affirmed accordingly, on the grounds of the opinion of the pundits of the Court below, and of the superior Court; and on its appearing that the net profits of the estate amounted to 6,236 rupees *per annum*, the appellants were made to pay costs.

A special appeal to this Court having been admitted, the case came to a hearing on the 10th of January 1821, before the Fourth Judge (S. T. Goad) who was of opinion that Kishnanund Chowdry alone should be responsible for the widow's maintenance in proportion to the share of profits he enjoyed, the pundits having declared, in answer to the questions of the Court, on the 18th of June 1819, that the step-son alone was liable for the payment of the widow's maintenance, and that the wife and son of a step-son were not at all responsible; but at the request of the respondent's *vakeels*, the case was again referred for the opinion of the pundits, who delivered the following reply to the questions of the Court: If the respondent's step-son, the wife of her step-son, and the son of her step-son, obtain possession of the *zemin-daree* left by her husband, the wife and son of her step-son are not liable to the payment of maintenance, inasmuch as uterine brothers, on succeeding to and dividing their father's property, are not enjoined by the *shasters* to give a share to their childless step-mother, but they are enjoined to allow her food and raiment. The maintenance of a step-mother rests on her step-sons alone.

Sricrishna Tarculancara in his commentary on the *Dayabhaga*, treating of the partition between brothers by different mothers, says, that there is no provision for giving a share to the step-mother, because she is not the mother of all the sons. For this purpose there should exist the same degree of relationship among all the persons dividing, when each widow of the proprietor would have a share equal to that of her several sons. The same principle applies in assigning a maintenance. The son of her contemporary wife is in the first instance bound to maintain his step-mother; in default of him, the son of the widow of the rival wife, and in his default the son's son of the rival wife, according to the proximity of their several relations; but they should not be required simultaneously to support her, as that would be a deviation from the spirit of the law. In the opinion of *Jimuta Vahana*, the assignment of a share to the widow of the original proprietor, and of maintenance, are to be considered as resting with the person who is nearest in degree of relationship, and not with the more remotely connected coparceners. The son of a rival wife, whether he has received the whole of his father's estate, or a part of it only, must supply his step-mother with food and raiment, and other necessary expences for the performance of her religious duties. This view of the case is confirmed by the doctrine of *Menu* and other legislators, who contend that a son is bound to maintain his father and mother, and may even commit a crime to effect this object. In fine, the son of the rival wife should support his step-mother out of the ancestral or acquired property, or out of both, and, if he should be dead or unable to do so, the duty should devolve on the son of the step-son or other parcener, but not otherwise. This opinion is con-

formable to the *Daya Bhaga*, *Daya Tutwa*, *Daya Crama Sungraha*, 1821.
Vivada Bhungarnuwa, and other books of law current in Bengal.

AUTHORITIES.—“Here, since the term mother relates to the natural parent, the step-mother does not participate, but she must be maintained with food and raiment.” *Daya Crama Sungraha*. “When partition is made by sons no share need be allotted to the step-mother who has no male issue, but food and raiment must be assigned, for the late owner of the property was bound to support her.” *Vivada Bhungarnuwa*. “In childhood must a female be dependant on her father; in youth on her husband; her lord being dead on her son.” *Mēnu*. “All the wives of the father are considered mothers.” *Vasistha*.

“Thus, if among all the wives of the same husband, one bring forth a male child, *Mēnu* has declared them all, by means of that son, to be mothers of male issue.”

“All the paternal grandmothers are declared equal to mothers.” *Vyasa*.

The Fourth Judge, after perusing the above legal opinion, gave judgment to the following effect: By the *vyavastha* of the pundits of this Court, Mussumaut Jydoorga (wife of Kishenchund, and proprietor of a four ana, five gunda, share of a nine ana zemindary left by the respondent's husband), and Bhyrochund Chowdree (son of Hurriachund, proprietor of a two ana, seven gunda, two cowrie share) are exempted from the payment of any allowance to the respondent. The Judges of the Zillah Court and the Moorshedabad Provincial Court have fixed the sum of 40 rupees *per mensem* for the respondent's maintenance, with reference to the annual profits of the whole property; and have made all the three shareholders liable to the payment of this allowance. But as Jydoorga and Bhyrochund Chowdree are exempted from contributing, Kishnanund Chowdree, the respondent's step-son, is alone liable for her maintenance, which however must be proportioned to his share of the annual profits of the estate, which, on computation, amounts to 1,644 rupees; deducting therefore 29 rupees, 8 anas, for the shares of Jydoorga and Bhyrochund from the 40 rupees *per mensem*, fixed by the Zillah Judge and the Provincial Court, there remain 10 rupees, 8 anas to be paid monthly by Kishnanund Chowdree to the respondent; and the Court are of opinion that the above sum is sufficient. The case having been referred for the opinion of the Chief Judge (W. Leycester) he briefly expressed his concurrence in the opinion delivered by his colleague, and a final decree was accordingly passed, amending the decision of the Provincial Court, and directing Kishnanund to pay to the respondent during her life, the monthly sum of 10 rupees 8 anas from the year 1219, B. S., after deducting the sum which the respondent had already received in consequence of the Zillah and Provincial Courts decrees.

1821.

Feb. 20th.

MUSSUMMAUT DOORPUTTEE, Appellant,

VERSUS

HARADHUN SIRCAR and others, Respondents.

Lands acquired by four undivided Hindoo brothers will after their death be made into four shares, and one share given to the representatives of each brother, unless it can be proved that there was any inequality in the degree of labour or funds supplied by one or more of them in making the acquisition.

THIS action was instituted on the 4th of May 1816, by the respondent and his brothers, in the Provincial Court of Moorshe-dabad, to recover possession of half an estate comprized in pergunnas Hundyaul, Jyasun, Chutterhalee, Chunderghatee, Buhmun Gaon and Kybakul, the triennial *jumma* of which was stated at 47,612 rupees.

The plaintiff set forth, that Ramgopaul Sircar, the grandfather of the plaintiffs, had four sons, namely, first, Anundeeram the father of the plaintiffs, second, Bhuggutram, third Ramcoomar, and fourth Radhamohun. The plaintiff's father supported his brothers entirely by his own means, and disposed of them in marriage. By trading and farming to a great extent the plaintiff's father accumulated a large capital, and continued to live as a joint and undivided family with his brothers. In 1202 B. S. Bhuggutram came to years of discretion, and entered into the service of Raja Ramkishen Buhadoor. In the year 1207 B. S. the pergunnas of Hundyaul and Jyasun were advertised for sale on account of arrears of public revenue; and the residence of the plaintiff's father being in the former pergunna, and hearing a great deal of the capabilities of the latter, he sent his brother Bhuggutram with a person named Panchann Singh to make the purchase for him of those lands, in the substituted name of the latter individual. Accordingly pergunna Hundyaul was bought by Bhuggutram in his own name for the sum of 4,100 rupees, and pergunna Jyasun in the name of Panchann Singh for the sum of 5,025 rupees, the funds being supplied by the plaintiff's father. Soon after this he dispatched his servant Deenooram to make the purchase of Chutterhalee, which was also to be sold by public auction, and gave him a power of attorney to make the purchase in his name; but the form being irregular he was unable to present it, and consequently was obliged to purchase the estate in his own name for 1,208 rupees. The funds for this purchase were also supplied by the plaintiff's father, partly raised by a mortgage of the purchased estate, which transaction was of course conducted in the name of Deenooram, who, however, executed a deed admitting that he was merely the nominal proprietor. The plaintiff's father, on representing the true state of the case to the public authorities, was acknowledged as proprietor of this and the other pergunnas. In the year 1208 B. S. Ramcoomar and Radhamohun died childless, and in the same year died Ramgopaul and Anundeeram, the plaintiff's grandfather, and father, the latter leaving three sons, namely, Haradhun, Ramkomul, and Soorjnarain (the plaintiffs), who being minors, their uncle Bhuggutram got possession of the entire estate as proprietor, and as their guardian and protector. Subsequently to the death of the father of the plaintiffs, their uncle, with the view of appropriating the whole estate, prevailed on the nominal purchasers of Chutterhalee and Jyasun to execute a deed of sale of them to him. At different times the other pergunnas were bought at public sale, Chunderghatee in the name

of the plaintiff Haradhun, and Buhmun Gaon and Kybakul, 1821.
in the substituted name of Panchanun Singh. All these purchases were made with the profits of the joint estate, and during the whole of this time Haradhun carried on joint concerns of trade with his uncle Bhuggutram, and was living in a state of union with him. Bhuggutram having no child, adopted a boy named Ramchurn in the year 1222, and falling sick the same year at Moorshe-dabad, he made a will in favour of Haradhun, admitting that of the entire joint property one moiety belonged of right to him (Haradhun) and his brothers, and bequeathing to them a two ana out of the eight ana share of the property which appertained to himself. He further appointed Haradhun to be guardian of his minor adopted son, and then died. After Bhuggutram's death his widow in collusion with others, made an effort to get possession of the whole property, and applied to the Collector of Rajeshahve, who, in consideration of the entry of Bhuggutram's name in the books, decided in favour of his widow and adopted son, and the estate was ordered to be placed under the charge of the Court of Wards. The plaint concluded by setting forth, that an ineffectual appeal had been made to the Board of Revenue against the above decision of the Collector. It was averred in reply by Mussumant Doorputtee and Ramchunder Talapatur (who had been appointed guardian of the minor), that the plaintiff's father had no concern whatever with Bhuggutram (the minor's adopting father), who lived separate and apart from all his brothers, and made the acquisitions of landed property now claimed, solely and exclusively by his own means, by *bonâ fide* private purchases. The defendants denied that any gift or will had been executed by the deceased in favour of the plaintiff, as alleged by him. Much conflicting evidence, both oral and documentary, was adduced by the parties in support of their respective allegations. On the 21st of June 1817, the Second Judge of the Provincial Court decided in favour of the plaintiffs, on the following grounds: It is highly improbable that Bhuggutram should, as alleged by the defendants, have purchased the pergunna of Jyasun from Panchanun Singh, and that of Chutterhalee from Deenooram, by private purchase. On the contrary, it is clear from the evidence adduced, that those lands were purchased jointly by Bhuggutram and the father of the plaintiff, at public auction, between the years 1207 and 1208 B. S.; because, after the former pergunna was purchased at public auction in the name of Panchanun Singh, that individual conveyed it by a deed of sale to Radhamohun, the uncle of the plaintiff; and caused such deed to be duly registered, and besides, Bhuggutram himself, in a former suit, alleged that he purchased the pergunna in question at public auction in the year 1207; and after the pergunna of Chutterhalee had been purchased at public auction in the name of Deenooram, Anundeeram took a written obligation from that individual to the effect that he had made the purchase with his means, on his behalf, and for his benefit. It appears also, from the evidence of thirteen witnesses adduced by the plaintiff, especially from the evidence of Panchanun Singh, that the pergunna of Jyasun was bought at auction in his name, that Anundeeram, the father of the plaintiffs, and Bhuggut-

Mussum-
mant Door-
puttee, v.
Haradhun
Sircar and
others.

1821.

Mussum-
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puttee, v.
Haradhun
Sircar and
others.

ram, the husband of Doorputtee during the life time of Ramgopaul their father, and Ramcoomar and Radhamohun their brothers, were living together as an united and undivided family, and with their joint funds purchased the pergunna of Hundial in the name of Bhuggutram, that of Jyasun in the name of Panchanun Singh, and that of Chutterhalee in the name of Deenooram; that the father, from the capital he had in his possession and by means of borrowing, supplied the funds for the latter purchase, that a written acknowledgement was taken from Deenooram, to the effect that the estate was purchased by him for Anundeeram, and that Panchanun Singh transferred by deed of sale the estate purchased in his name to Radhamohun, that all the brothers continued in joint possession, and that after the death of Anundeeram and Radhamohun, Bhuggutram caused deeds of sale of the estates in their names to be made in his favour, and procured his name to be registered as proprietor of them; and that when Haradhun came of age, he took possession of the landed and other property jointly with his uncle Bhuggutram, and regularly enjoyed the profits. The will executed by Bhuggutram has been fully proved, and it has been also proved, that Doorputtee acknowledged its validity; but there is no necessity to enquire into its validity or otherwise, for as there is abundant testimony to prove that the family was joint and undivided, the plaintiffs are at all events entitled to one moiety of the estate in right of inheritance. The surplus two ana share which they claimed in virtue of the will was devised to them on condition of their educating the minor adopted son of Bhuggutram; but in consequence of existing differences, and another guardian having been appointed, this condition cannot be fulfilled by them, and they have therefore relinquished the claim to this portion. The plaintiffs were therefore declared entitled to one moiety of the estate, consisting of pergunnas Hundyal, and the other pergunnas claimed. The appellant and Nundkishore Nuudee (who had since been appointed guardian to the minor), being dissatisfied with the above decision, appealed from it to the Court of Sudder Dewanny Adawlut. Shortly after the admission of the appeal, the minor (Ramchund) deceased, Mussummunt Doorputtee was allowed to conduct the appeal, as his next heir and representative. The Fourth and Officiating Judges (S. T. Goad and W. Dorin) before whom the appeal was heard, made the following comments on the evidence adduced: It has been established both by oral and documentary evidence, that the estate of which the respondents claim one moiety was not acquired by Bhuggutram by his own exclusive industry, and his own exclusive funds. The *mehals* of Hundyal, Jyasun and Chutterhalee, were acquired at a time when all the four brothers (sons of Ramgopaul) were living together as a joint and undivided family, and were trafficking with joint stock. This was about the year 1207 or 1208 B. S., and at that time they were all in possession of lands as coparceners. In like manner the three other *mehals* of Chunderghatee, Buhmun Gaon, and Kybakul, were purchased between the years 1211 and 1219 by means of the joint funds of the coparceners. Such parts of the estate as had been purchased at public auction were afterwards reconveyed by the nominal to the real purchasers. That

the lands were purchased with the joint funds is clear from the evidence of the witnesses of both parties, as well as from the documentary evidence: especially from the will of Bhuggutram, in which there is a distinct admission of Anundeeram's right of participation, as well as from the answer of the same individual in a former suit, in which the same admission is unequivocally made. It also appears that Ramcoomar, the third son, died childless, leaving a widow, in the year 1208 B. S., after the purchase of the *mehuls* Hundyaul, Jyasun, and Chutterhalee; that in the same year Radhamohun, the fourth son, also died childless, leaving a widow; and lastly, that Anundeeram died in the same year, leaving three sons (the respondents) and his brother Bhuggutram, the husband of the appellant. In the year 1222, Bhuggutram died, leaving his widow and an adopted son Ramchurun, he being at the period of his death living with his nephews (the respondents) as a joint and undivided family. The adopted son has since died. There being then surviving of Ramgopaul's family, the three sons of Anundeeram, who are the respondents, the widow of Bhuggutram, who is the appellant, and the widows of Ramcoomar and Radhamohun, the Judges deemed it advisable to consult the pundits as to the mode in which the estate should be distributed among these survivors. They were accordingly desired to expound the law on this point, according to the doctrine current in Bengal. The pundits replied by stating that the proper mode of distributing an estate acquired by a joint and undivided family, was to ascertain the quantity of funds and labour supplied by each individual member of the family, and to apportion the shares accordingly; but that where this fact was not to be ascertained, the rule is, that the property should be equally divided among the coparceners; according to which rule, the three sons of Anundeeram, the widow of Bhuggutram, and the widows of Ramcoomar and Radhamohun, were entitled to the portions of those whom they represented respectively. After perusing the above opinion, the Judges, on the 20th of February 1821, recorded their judgment, that "as it was impossible to ascertain with any degree of accuracy the quantum of labour and funds supplied by each of the brothers, it was equitable to distribute the property agreeably to the rule laid down by the pundits among the survivors. A final decree was accordingly passed amending that of the Court below, and awarding one share of the estate to the appellant, as widow of Bhuggutram, one share to the respondents as sons of Anundeeram, and one share each to the widows of Ramcoomar and Radhamohun. Both parties were ordered to account to the widows of Ramcoomar and Radhamohun for the mesne profits of their shares during the period of their dispossession, and the appellant was ordered in like manner to account to the respondents for the mesne profits of their share. The costs were made payable by the parties respectively."

1821.

Mussum-
naut Door-
puttee, v.
Haradhun
Sircar and
others.

1821.

ARMAN PANDE and others, Appellants,

versus

Feb. 20th. NOURUTTUN KOONWUR, (widow of BYJA SINGH, deceased,
and guardian of his minor son KHETUR SINGH), Respondent.

In case of a sale of land with stipulation of its being cancelled in the event of the purchase money being repaid within nine years, accompanied at the same time by an undertaking on the part of the sellers that a portion of the property so sold (which had been previously mortgaged) shall be redeemed within three months, or on failure thereof that the conditional sale shall immediately become absolute, held, that such contract should not be enforced, as being unjust towards the sellers, and contrary to the provisions of regulation 17, 1806.

ON the 31st of January 1815, Byja Singh brought an action in the Patna City Court against Arman Pande and Jeolal Rai for possession of one half of mouza Muhwar Khas, situate in pergunna Shahpoormeer, the triennial revenue of which was stated to be 565 rupees.

It was stated in the plaint, that half the mouza in question belonged to the plaintiff, and the other half to one Oodhoo Singh; and that they had, in the *Fuslee* year 1212, joined in making a conditional sale of it to the defendants, in consideration of their having advanced them a loan of 1,001 rupees; that long before the period specified, the plaintiff tendered repayment of the money borrowed, requesting a receipt for the same, and that his half of the estate should be given up, with which request however the defendants refused to comply; whereupon the plaintiff was desirous of depositing the money in Court, but he was informed by the Judge that there was no necessity for that, as the conditional sale could not become absolute, agreeably to the provisions of regulation 17, 1806, until the purchaser should present a petition that a notice of one year should be served on the seller, but that the plaintiff was at liberty, if he pleased, to institute a regular suit for the immediate recovery of his share, which proceeding he now adopted accordingly.

The detail of the transaction as given by the defendant, Jeolal Rai, was as follows: On the 16th of *Kartick*, Oodhoo Singh, proprietor of one half of the mouza in dispute, having fixed the sum of 500 rupees, 8 annas as the price of his share, took from him (the defendant) the sum of 50 rupees, and gave him a written agreement that he would within the space of two months execute a formal deed of sale; but in consequence of the existence of disputes between him and the plaintiff, he (Oodhoo Singh) had recourse to many excuses, and delayed the performance of his promise for three years and seven months; at length matters being amicably adjusted between them, the plaintiff sold his share for 500 rupees, 8 annas, to Arman Pande; and Oodhoo Singh sold his share to him, Jeolal, for the same sum, receiving the difference of what he had formerly received. The deeds of sale for both shares and the receipts were made out on the same paper and registered at the same time. After the date on which Oodhoo Singh originally received the purchase money, but in the same month and year, he mortgaged eighteen beegas of land situated in Lutefabad, a dependency of Muhwar, to Ishq Odallah, Akloo Muhtoon and Dyal Choudhree, for a loan of one hundred and fifty-one rupees, and there being this incumbrance on the estate, the plaintiff and Oodhoo Singh, at the time of the transaction with the defendant and Arman Pande, took from the latter an engagement that the sale was not to be considered absolute until nine years after date, they themselves entering into another engagement that they would on or before the full moon of the month of *Shadoon* of the same

year (1212 F. S.), procure from the mortgagees and deliver up to the conditional purchasers the mortgage deed for the eighteen beegas above specified, or in the event of their inability to do so, that the obligation executed by the defendant and Arman Pande should be considered void and of no effect, and the conditional sale should become immediately absolute. As they failed in the engagement, it became necessary for the defendant and Arman Pande themselves to redeem the mortgage, which they did accordingly, by paying to the mortgagees the sum borrowed from them. Oodhoo Singh has since executed a written obligation in his favour to the effect that the conditional sale had become absolute, and the defendant therefore has nothing to do with the plaintiff. The other defendant, Arman Pande, made a defence nearly to the same effect; but added that after the redemption of the mortgage of the eighteen beegas by himself and the other defendant, the plaintiff also gave an acknowledgment that the sale had lawfully become absolute, and that this acknowledgment and all the other documents in the case were with Jeolal Rai, in collusion with whom the plaintiff had brought the action; and lastly, that had there been any foundation for the plaintiff's claim he would undoubtedly have been joined in it by Oodhoo Singh. The plaintiff, in replication, wholly denied that he had ever made any declaration that the sale had become absolute: he stated that the mouza in question was the paternal property of himself and Oodhoo Singh, that it was never divided, but by the advice of his father registered in the name of Oodhoo Singh alone; but as by the mismanagement of this individual the estate fell into arrears, and was about to be sold by public auction, it became necessary to borrow money, and the plaintiff was about to borrow a sufficient sum from Prankishan Pande, father of Arman Pande, on the security of a conditional sale, when that person stated that he would rather be joined in the transaction by Jeolal Rai, with whom he had some pecuniary concerns, and with whom Oodhoo Singh had also been in treaty for an advance of money on the same security; that the deeds were not drawn out separately with the view of avoiding expence; that the plaintiff was all along willing to pay his share of the debt due to the mortgagees, which he tendered before the expiration of the stipulated period to the defendant and Jeolal Rai, and when they refused it, to Ishq Oollah and the other mortgagees, who all, one after another, declined to receive it, on the plea that their dealings were with Oodhoo Singh alone; that the plaintiff then took the amount to the *Casae* of the pergunna, and wished him to receive it in deposit, but on his refusing to do so, the plaintiff caused him to register the date on which the tender was made, and deposited the money with a neighbour named Hurdhee Muhajun, with whom it now is, at the service of any of the parties who may be entitled to it; that inasmuch as the mouza is held in joint tenancy, the plaintiff was necessitated to bring his action against both defendants; otherwise, in reality and point of fact, he had no claim against, and no transaction with, Jeolal Rai. Arman Pande rejoined by denying the tender, and insisting that he had no separate transaction with the plaintiff. Jeolal Rai rejoined by reasserting that his share of the transaction was entirely distinct and separate from that of the other defendant,

1821.

Arman
Pande and
others, v.
Nouruttun
Koonwur.

1821.

Arman
Pande and
others, v.
Nouruttun
Kodanwar.

that he had nothing to do with the plaintiff, and that his concern was with Oodhoo Singh alone. On the 30th of July 1816, the Officiating Judge of the Patna City Court gave his judgment in the following terms: The defendants admit that their purchase of the lands in dispute was originally a conditional purchase only, but they bring forward a written engagement executed by the plaintiff and Oodhoo Singh to render the condition inoperative and the sale absolute. They allege that the terms of the engagement not having been fulfilled, the plaintiff's right and interest in the lands have ceased. But, in point of fact, the engagement executed by the plaintiff cannot be held to have the effect of doing away the condition under which the purchase was made. It is not the usual or regular course of proceeding in case of a conditional sale that the condition contained in the deed should be avoided by the execution of another instrument; besides, it appears that according to the terms of this engagement it was stipulated that the mortgage on eighteen beegas of land, comprised within the estate conditionally sold, should be redeemed a very short time after the date on which the conditional sale was made; and it has been proved by evidence, that within the stipulated term the plaintiff did actually tender to the mortgagees half the money borrowed, which they refused to receive, on the plea that the whole must be repaid at once. Two of the mortgagees admit this fact. The engagement therefore adduced by the defendants as having been executed by the plaintiff ought not to operate to exclude him from possession of his portion of the estate, or to have the effect of converting the conditional into an, absolute sale. But as the estate in dispute is held in joint tenancy, and as, when it was conditionally sold there was no attempt made to separate and define the shares of the respective sellers, the plaintiff cannot be entitled to recover possession until he repay in the first instance the entire amount of the purchase money as specified in the deed of conditional sale. He therefore decreed that the plaintiff should pay to the defendants the sum of 1,001 rupees, and enter on possession of the entire mouza, of which he should be considered the sole proprietor, unless his partner Oodhoo Singh preferred, without delay and without reserve, to reimburse him in the moiety of the sum which had been advanced by the plaintiff on his account. The costs were made payable by the parties respectively.

The defendants being dissatisfied with the above decision appeared therefrom to the Patna Provincial Court, and Jeolal Rai decessing after the admission of the appeal, was succeeded in the prosecution of it by his sons and representatives Hoomeil Rai, Phoolail Rai, and Gunga Bishen. At this stage of the proceedings, Oodhoo Singh, the partner of the original plaintiff, came forward and petitioned to be admitted to a participation in defending the appeal, on the plea that he was proprietor of a moiety of the estate, and had in compliance with the decree of the City Court deposited his portion of the purchase money due to the original defendants. The prayer of this petition was complied with, and the necessary proceedings and pleadings having been gone through, the Senior Judge of the Court of Appeal gave judgment in the following terms: The appellants have not satisfactorily proved

that the respondents did really make any written acknowledgment of the conditional sale having become *bond fide* absolute. Had such an acknowledgment been executed, it is most probable that it would have been duly registered, and the deed of conditional sale cancelled. The subsidiary obligation relative to the eighteen beegas of mortgaged land comprised within the estate conditionally sold, is in reality repugnant to the spirit of the provisions contained in section 8, regulation 17, 1816; and it was possible moreover that the fulfilment of the condition contained in that obligation might not have been in the power of the obligors, as the mortgagees might have refused their consent to a redemption of the mortgage. Under these circumstances there appears to be no good and sufficient reason for interfering with the decree of the City Judge. He further directed that the respondents were at liberty to sue the appellants for any excess which they might suppose them to have realized from the profits, after refunding to themselves the money advanced to the mortgagees with interest, and that the appellants were at liberty to sue the respondents in the event of their not having realized the sum advanced by them to the mortgagees, with interest from the profits of the estate conditionally sold.

1821.

Arman
Pande and
others, v.
Nouruttun
Koonwur.

Arman Pande and the successors of Jeolal Rai being still dissatisfied, presented a petition to the Court of Sudder Dewanny Adawlut, praying that a special appeal from the above decision might be admitted; and the reasons assigned being considered sufficient, an appeal was admitted accordingly. Shortly afterwards Byja Singh died, and his widow Nouruttun Koonwur appeared as the respondent on her own behalf, and on that of her minor son Khetur Singh. Oodhoo Singh was not made a party by the appellants, but he presented a petition to the same effect as that which he had preferred to the Provincial Court. On the 20th of February 1821, the Fourth and Officiating Judges (S. T. Goad and W. Dorin) after an attentive perusal of the evidence and pleadings, recapitulated the substance of the case, and delivered their judgment in the following terms: The respondent, who was formerly plaintiff in this case, brought an action against Arman Pande and Jeolal Rai, to recover possession of half of mouza Muhwar, on the ground that he (the plaintiff) and Oodhoo Singh, his partner (joint proprietor of the mouza in question) had, on the 6th of *Jeth* 1212, F. S., conveyed the same by a deed of sale for the sum of 1,001 rupees to defendants, taking from the purchasers at the same time a written obligation, that in the event of the purchase money being refunded within the period of nine years, the sale should be cancelled. This transaction seems to be clearly of the nature of a conditional sale, which is in frequent use in the province of Behar. It also appears, that before the execution of the deed of sale, eighteen beegas of the lands sold had been mortgaged on a loan of 15½ rupees to one Ishq Oollah and other mortgagees. Arman Pande and the other defendant declared that the plaintiff and his partner executed to them, on the same date as above, a writing, undertaking that by the full moon of the month of *Bhadoo* 1212 F. S., they would redeem those mortgaged lands, and in the event of their failing to do so, that the obligation executed by the purchasers

1820.

Arman
Pande and
others, v.
Nourutun
Kopnawur.

to cancel the sale in the event of repayment of the purchase money within the period of nine years, should be void and of no effect, and the conditional sale should immediately become absolute. The defendants further alleged, that the mortgaged lands were not redeemed within the period stipulated, in consequence of which the defendants themselves repaid to the mortgagees the money lent by them, and thereby redeemed the mortgaged beegas, and converted the conditional into an absolute sale; and that, subsequently, the plaintiff himself, and his partner, had acknowledged the fairness and validity of the transaction. From the proofs advanced in this case, it is evident to the Court, that the undertaking to redeem the mortgaged lands, alleged to have been executed by the plaintiff and his partner, were really so executed, and it is equally clear, that in consequence of their having failed to make good their engagement, the defendants redeemed the lands for them. But a doubt exists as to the authenticity of the written acknowledgments alleged to have been executed by the plaintiff and his partner, admitting that the estate had become fairly and absolutely sold: had this been the case, the written obligation executed by the purchasers would have been cancelled. In the opinion of the Court, the intention of the plaintiff and his partner was merely to borrow money on the security of their estate. As to the mortgage transaction, admitting the fact to be as stated by the defendants; admitting that the plaintiff and his partner entered into a written undertaking, that in the event of their not redeeming the mortgaged beegas in *Bhadoo* 1212 F. S. (that is about three months from the date of the undertaking) the sale, which otherwise would not have become absolute for nine years, should be perfected in three months, still such a transaction cannot be upheld, as it bears on the face of it manifest over-reaching and injustice towards the plaintiff and his partner. Besides, as a case of conditional sale, which in point of fact it is, it cannot stand, consistently with the provisions contained in regulation 17, 1806, which are applicable to this species of contract, and agreeably to which no conditional sale can become absolute without the prescribed notice of one year to the seller. For these reasons, therefore, it was decreed that the representatives of Byja Singh (the original plaintiff) and his partner Oodhoo Singh were entitled to possession of the property in dispute, on payment of the principal sum of 1,001 rupees, leaving the profits of the estate enjoyed by the appellants to be held as a set off to their claim of interest, and on payment also of the principal sum of 151 rupees, with interest to the same amount, to reimburse the appellants for the amount advanced by them to the mortgagees. The decree of the Provincial Court was amended accordingly.

JOWAHIR SINGH, Appellant,

1821.

versus

CHUNDERNARAIN RAI (his Mother), and RADHAMADHO GHOSE (his Guardian), Respondents. March 26th.

THE appellant sued the respondents in the Purneah Zillah Court on the 15th of March 1809, to recover 1,208 rupees, principal and interest, on account of the proceeds of a *haut* called Gunge Shukrbaree in pergunna Sheershabad.

The plaintiff set forth, that although the above pergunna, which was the property of the minor defendant, Chundernarain, had been farmed by the Collector to the plaintiff for ten years, from 1210 to 1219, B. S: the defendants had taken possession thereof, claiming it as the farm of one Gunganarain Mujmoadar deceased, and causing the net profits of it, which amounted annually to the sum of 207 rupees, to be paid into their own treasury, instead of into that of the pergunna *cutcherry*; that the plaintiff had sued one Goureechurn, who was the ostensible under tenant of the aforesaid Gunganarain, in whose name the defendants had realized the profits, and on its being proved that Gunganarain was dead, that Goureechurn was not actually his under tenant, and that the defendants in reality were in possession and enjoyment of the *haut* and its profits, obtained a decree on the 30th of July 1807, since which time he had been in possession of the *haut*, that the plaintiff therefore now sued for mesne profits from 1210 to the 30th of *Phalgun* 1215 B. S., (the period it had been possessed by the defendants) which according to the account produced, amounted to 865 rupees principal, which sum, together with 343 rupees for interest, formed the sum now claimed.

In a suit instituted against a minor landholder and his guardian jointly, to recover rents unduly levied during the minority of the former, held that the latter is alone liable, in the first instance, notwithstanding that the former had attained to majority before the final decision of the suit.

The defendants, in reply, denied that they had been in the possession and enjoyment of the profits of the *haut* of Gunge Shukrbaree, and stated that the records of the Collector's office would prove that it was held by Gunganarain Mujmoadar, under an *istimrarree* tenure; that when the plaintiff sued Goureechurn as the under tenant of the *istimrardur*, to obtain possession of the *haut*, he was unable to prove either that Gunganarain was dead, or that the defendants had, under a fictitious name, enjoyed the profits of it; and that the decree obtained by the plaintiff on that occasion awarding him possession of the property in dispute, and against which Goureechurn had made no appeal, did not affect them.

The papers of this case were afterwards sent from the Dinagepoor Zillah Court, for decision to the Second Register at Malda, who on the 24th of December 1817, observed, that although it had not been clearly ascertained in what year Gunganarain died, it appeared from the decree filed by the plaintiff, that after his death the profits of the *haut*, which was a part of the plaintiff's farm, were enjoyed by Chundernarain, and that from the depositions of the plaintiff's witnesses, it appeared that he had been out of possession of the *haut* from 1210 to *Assar* 1214 B. S., during which time the annual profits were 201 rupees. He was therefore entitled to profits at that rate for four years and three months, which amounted to 838 rupees, and to 333 rupees interest thereon, altogether

1821. 1,171 rupees, 14 anas, 2 gundas, 2 cowries; but as it appeared that Chundernarain Rai had become of age, and was in the enjoyment of his property, and that the guardianship of Radhamadho Ghose had ceased, and as his mother was a woman living in retirement, he passed a decree directing Chundernarain alone to pay the above sum to the plaintiff, with interest and costs.

Jowahir
Singh, v.
Chunder-
narain Rai
and Radha-
madho
Ghose.

Chundernarain Rai appealed to the Moorshedabad Provincial Court, and on the 22d of August 1818, the First and Fourth Judges passed a decision to the following effect: During the year in which the plaintiff represented the defendants to have received the produce of the *haut* of Gunge Shukrbaree, Chundernarain was a minor, and his zemindaree was under the charge of the Court of Wards. Radhamadho Ghose had been appointed his guardian, and a sum allowed by the Collector for his expences. If therefore the guardian, Radhamadho Ghose, in addition to the above sum, collected and expended the produce of the *haut* in question, he, and not the appellant, was responsible; besides, when the Collector gave the above *pergunna* in farm to the respondent, he presented him with a statement of what it contained, in which statement the *haut* of Gunge Shukrbaree was included, and from which he might have learnt that it constituted a part of his farm. If therefore he did not obtain possession of the above *haut*, in consequence of the proceeds of it being collected by the defendants, he ought immediately to have represented it to the Collector, and to have sued the guardian. But as he had not done so, Chundernarain was not responsible. They therefore passed a decree in favour of the appellant, reversing the decision of the Second Register at Malda, and dismissing the claim with costs, and referred the respondent, if he had any claim to mesne profits, to an action against Radhamadho Ghose the guardian.

The present appellant preferred a petition for a special appeal to this Court, which was granted, and the cause came to a hearing before the Third and Officiating Judges (S. T. Goad and W. Dorin) whose final judgment in the case was recorded to the following purport: It appears, that in the year 1210 B. S., the *pergunna* of Shershabad, which was the zemindaree of Chundernarain Rai, one of the respondents, was, in consequence of his being a minor, farmed by the Collector to the appellant for ten years, who, on account of not obtaining possession of the *haut* of Gunge Shukrbaree sued one Goureechurn, the ostensible tenant, and obtained a decree in the Purneah Zillah Court on the 30th of July 1807, declaring him entitled to the possession and enjoyment of the profits of the above *haut*. It had been proved that the property in question was, as stated in the plaint, a part of the appellant's farm, and that the profits of it from the year 1210, to the 16th of *Srawun* 1214 B. S. had been collected (as admitted) by the *gomasthas* of the zemindar to defray (as they stated) his domestic expences, but it had not been proved that the sums so collected had been *bona fide* expended in that way. As, however, in the year 1210 B. S. the zemindar was only eight years old, and a guardian had been appointed for him, if the profits of the *haut* had not been enjoyed by the farmer, and had been expended in an unauthorized manner, the fault was not the zemindar's but the guardian's, and he was respon-

sible. If, on the other hand, it could be proved that the sums collected were really employed to defray the domestic expences of the minor, and if such expences were proper and reasonable, the guardian might recover the amount from the zemindar, but if otherwise expended, he alone was responsible, and had no just claim to reimbursement. They therefore passed a decree against Radhamadho Ghose, in favour of the appellant, reversing the judgment of the Provincial Court, and ordering the decree of the Register to be amended, awarding to the appellant the amount of his claim with interest from the date of the decree till payment should be made by Radhamadho Ghose, who, if he could prove that the sums realized had been expended for the use of the zemindar, was at liberty, if he thought proper, to sue that individual for reimbursement.

1821.

Jowahir Singh, v. Chundernarin Rai and Radhamadho Ghose.

KOONJBEHAREE LAL, Appellant,
versus
GOVERNMENT, Respondent.

1821.

March 26th.

THIS was a suit instituted by the appellant in the Patna Provincial Court on the 20th of February 1816, against the respondent, to recover 14,445 rupees, 10 anas, profits for eight years of talook Burreerah Hureesing, in pergunna Tulleah, in the Zillah of Tirhoot, from the beginning of *Chey* 1213 to 1220 F. S., and 10,110 rupees, 10 anas, interest thereon, from 1214 to the end of *Poos* 1223 F. S., total 24,556 rupees, 14 anas.

The surety of a fictitious lessee is not entitled to sue for profits, on the plea that the lease had been unjustly cancelled, and that he (the plaintiff) was the real lessee.

The plaint set forth that the plaintiff, in 1211 F. S., obtained the above talook at a *jumma* of 6,883 rupees, 3 anas, from the Collector (Mr. James Rattray) on a ten years lease, until 1220 F. S., under the name of Modee Lal Mutusuddee, on his own security; that the *pottah* and *kuboolceyut* of the above talook were drawn out separately by the Collector in the name of Modee Lal, subject to the approval of the Government and the Board of Revenue, and given to the plaintiff, who obtained possession and paid the revenue; that afterwards a *purwanna*, dated 20th of August 1804, was issued by the Collector in the name of Modee Lal, notifying that the Government and Board of Revenue had approved of the lease for ten years. The plaintiff, in consequence of the revenue of the pergunna having been collected in advance by the Collector's *aumeens* and the *tehsildars*, previously to his obtaining possession, presented a petition to the Collector to deduct the sum collected by the above persons; that Gouree Dutt was consequently appointed an *aumeen* to examine the accounts of the talook; and the Collector finding from the report made by him, that after deducting the wages of the *aumeens* and *tehsildars*, and the money received by himself, the sum of 762 rupees was due from the *aumeens* and others, ordered on the 19th of October 1804, the above sum to be remitted, and accordingly it was deducted from the year Government revenue; and the remainder of the revenue for the year 1211 F. S., was received from the plaintiff, to whom the Collector gave an acquittance for the whole year; that in 1212 F. S., the Collector (Mr. Robert Graham) issued an advertisement, notifying

1821.

Koonjbe-
haree Lal,
v. Govern-
ment.

the sale of talook Bishenpoor, the plaintiff's *milkeeyut*, on account of the above sum, which was claimed as due, although it had been remitted; but, in consequence of a petition presented by the plaintiff under the name of Modee Lal to the Board of Revenue and the Zillah Judge, the sale was deferred according to the precept of the Court, and the revenue of that year was paid; that when, in 1213 F. S., the Collector again issued a notice demanding the above sum, the plaintiff sent the money by the hands of Modee Lal, who having explained the circumstances of the remission of the above amount, petitioned the Collector to receive it as a deposit, but he refused to take it, and, disregarding the acts of his predecessor, attached and advertised the plaintiff's *milkeeyut* for sale, on the plea that there was an arrear of 3,828 rupees down to *Phalgun* 1213 F. S., but on its appearing that no such sum was due from the plaintiff, the sale was postponed according to the order of the Board; that although the Board, in consequence of plaintiff's petition, considered the claim for the arrear of 1211 F. S., improper, and gave orders for the remission of it, still the Collector would not give possession to the plaintiff, although the term of the *pottah* had not expired, but made a settlement for it with the proprietor, on which grounds he now sued to recover the profits of the lease of which he had been unjustly deprived.

The defendant, in reply, stated that Modee Lal in whose name the lease was granted, was not the plaintiff in the present suit, nor had he transferred his right to the plaintiff, who was his surety; and therefore that the claim for indemnification of the loss sustained by the lease being annulled ought not be allowed; that section 12, of regulation 3, 1794, declares, "that if a Collector shall demand a sum of money from a proprietor or farmer of land, and the proprietor or farmer shall deny by a writing to that effect, addressed to the Collector, the justness of the whole or part of the demand, but to prevent any further process being issued against him shall discharge the whole of the demand, the proprietor or farmer shall be at liberty to sue the Collector in the Dewanny Court of the Zillah for the recovery of the sum:" and as the plaintiff had not adopted this line of conduct, and the Collector had continued to issue processes against him, the 6th clause of the 23d section of regulation 8, 1799, authorized the cancelling of the lease; that no other person was entitled to the profits or subject to the losses arising from a nonobservance of the regulation; that the *purwanna* under the Collector's signature to his *tehsildar*, and the acquittance for the whole of the year 1211 F. S., which had been produced by the plaintiff, could not be found in the Collector's books, but in the papers for the year 1211 F. S., the sum stated by the plaintiff as having been remitted is described as arrears; that the contents of the *purwanna* dated 17th of October 1804, did not agree with the Collector's order of the same date, written on the plaintiff's petition; that in the time of Mr. Graham it was found, after strict enquiry, that the above sum was due from the plaintiff, which could be proved by that gentleman's orders, dated 27th of March 1805, and that although Modee Lal's lease had been annulled in the above gentleman's time (in 1806), no suit had been instituted to have it reversed till 1810; that even

if the order and acquittance produced by the plaintiff were correct, his claim ought not to be allowed, as the Acting Collector had no power, without the sanction of the Board of Revenue, to remit the above sum, for the Board, on receiving the report made by the succeeding Collector, reversed the order, and directed the above sum, which had been improperly deducted, to be taken from the farmer. Besides, by the 6th section of regulation 14, 1793, a farmer must claim the collection of previous months from the *aumeens* who had charge of the lands before he obtained possession, and not from the Government; and that this lease, which had been duly sanctioned, was not cancelled on the authority of the Board of Revenue only, but in consequence of a special order of Government, dated March 20th, 1806, directing it to be annulled on the grounds of an arrear of 762 rupees revenue for 1211 F. S.

1821.

Koonjbeharee Lal,
v. Government.

On the 11th of December 1818, the Acting Judge recorded his opinion, observing that the plaintiff had represented Modee Lal as the fictitious lessee, and himself as the surety; but that it did not appear that the Collector, at the time of making the lease, considered the plaintiff in the light both of lessee and surety; on the contrary, it was not known at that time that Modee Lal was a fictitious person, nor was it discovered that he was so until enquiries were made; that the Collector, with the consent of the Board, made the lease to Modee Lal, for whom Koonjbeharee Lal offered security on that occasion; that if the surety had died, the lease would still have continued good, on the lessee's giving the security of another person, but if the lessee had died, it would have ceased at once, and that therefore, as Modee Lal was a fictitious person, there was no actual lessee, neither had the surety any claim to the profits of the farm; that even admitting the lease to Modee Lal to have been valid, the plaintiff ought, if there was an arrear for 1211 F. S., (which was evident from the plaintiff's admitting that he petitioned the Collector to deduct the sum collected by the *aumeens* and *tehsildars* from the revenue of the talook) to have paid the Collector's demand, according to regulation 3 of 1794, and he might afterwards have disputed the justness of it; but as he has not done so, the lease was cancelled, with the approval of the Governor General in Council, according to regulation 7 of 1799; and no Court was authorized to pass orders about lands the lease of which had been annulled; that the plaintiff's statement, that he had been in the enjoyment of the profits of the above talook for two years, and consequently that he was entitled to the profits for the remaining eight years, was altogether absurd. He therefore ordered the suit to be dismissed with costs.

The plaintiff appealed to this Court, and the cause came to a hearing on the 26th of March 1821, before the Second Judge (Courtney Smith) who having weighed the statements of both parties and the whole of the proceedings in the case, recorded his opinion that as the lease was cancelled in the usual manner and in conformity to the regulations of Government, and as in this case Modee Lal (the lessee) was a fictitious person, no one was liable for the profits of the farm, nor could the surety in the lease claim the profits of it on the plea that he was the actual lessee.

1821. THE COLLECTOR OF BENARES. and BIRJUTTUN DAS,
and on his death CAWN DOSS, Appellants,

April 4th.

versus
COSA GIR and RAJ GIR, Respondents.

The non-payment of the prescribed deposit on the day of sale by an auction purchaser is not a sufficient reason to set aside a sale, provided the purchase money be paid within the period required, but a sale may be annulled by reason of its being made on a date different from that which was advertised.

COSA GIR and Raj Gir were the plaintiffs in this case. They sued the Collector of Benares, his *Roobukaree nuvees* (Jymungul Singh) and Birjuttun Das. The latter was the auction purchaser of an estate called Bhuttowlee Kulan, belonging to the plaintiffs, which had been sold for arrears of revenue. The plaint was filed in the Benares Provincial Court on the 19th of April 1824. It set forth, that on a former occasion when arrears accrued on the estate, Mr. Salmon, the Collector, advertised it for public sale on the 11th of May 1812: on which the plaintiffs appeared, paid a considerable part of the arrears, and promised to pay the rest by instalments, giving Gyan Gir as their surety that the revenue should be regularly paid to the end of the year. This security was received as satisfactory, and the sale was accordingly put a stop to; but on the 21st of October of the same year, the Acting Collector proceeded to sell the estate on account of arrears. The plaintiffs attended and remonstrated, stating that they had furnished security already, and that they would mortgage their estate with a view to realize the balance in the event of the sale being postponed. In consequence of this remonstrance the Acting Collector postponed the sale until the ensuing day; and then, although the indulgence of only half an hour's delay was solicited, he would not grant it, but disposed of the property for the trifling sum of 1,235 rupees to Jumungul Singh, who was in collusion with the other defendant. It was urged, moreover, that the property was worth upwards of 20,000 rupees, being in the immediate vicinity of the city of Benares, and containing 1,600 beegas of land, upwards of 1,000 of which were arable. In reply, it was alleged that the plaintiff's property had been fairly sold on account of arrears of revenue; that the measure had not been adopted until after repeated evasions and excuses on the part of the plaintiffs; that the time of sale had been postponed to the latest hour in the evening, and just when the *Cutcherry* was about to break up; and lastly, that the security bond alluded to by the plaintiffs had not been regularly and duly executed.

On the 10th of August 1818, the Officiating Judge of the Benares Court (C. Smith) after an attentive perusal of all the evidence, documentary and oral, adduced in the case, recorded his judgment to the following effect; In the first place, it appears that the property of the plaintiffs was sold by auction for the sum of 1,235 rupees, which sum was paid into the Collector's treasury by instalments on the following dates: on the 21st of October 179 rupees; on the 29th of the same month 55½ rupees; and on the 6th of November 504 rupees. Admitting therefore that the whole of the purchase money was paid previous to the expiration of fifteen days, the period fixed by the Collector's order, still a deposit of fifteen per cent was not made on the day of sale, because the per centage at that rate, on the sum of 1,235 rupees, would amount to 180 rupees: some anas, whereas, on the day of sale, only 179 rupees were

paid in. This act being contrary to the provisions contained in section 2, regulation 12, 1796, must necessarily vitiate and invalidate the sale. In the second place, it appears that when the estate was first advertised for sale, the plaintiffs really did, as stated by them, furnish security for the punctual payment of the rent to the end of the year, and the Collector in answer to the question why he did not call upon the surety previously to resorting to the measure of a public sale has nothing to allege, but that the security bond was drawn up in an irregular manner. From an inspection of that document, however, it appears that the body of it contains a clear and unequivocal declaration by Gyan Gir that he had become the surety of the plaintiffs, and that it is duly signed and attested, and is in every respect a complete and valid instrument, except that on the back of it the name of Cosa Gir is carelessly and negligently written by one of the Collector's officers, instead of Gyan Gir. This error is not sufficient to invalidate the deed, and the surety was held to be sufficient by the former Collector, Mr. Salmon. The Acting Collector must have concealed from the Board's knowledge the fact of security having been given; otherwise he would have been instructed to call upon the surety for the payment of the arrears prior to exposing the estate for sale. In the third place, it appears that the sale took place in the evening, just as the *cutcherry* was about to break up, at a time when there was no other bidder present but Cawn Das the brother of Birjuttun Das, who was an interested party. Such precipitancy in conducting a public sale is clearly at variance with the spirit and intent of the regulations.

1821.
The Collector of Benares and Birjuttun Das, v. Cosa Gir and Raj Gir.

He decreed therefore in favour of the plaintiffs, ordering that they should be put in possession and the sale annulled, and that the Collector should proceed to recover the arrears from their surety in the mode pointed out by the regulations: The costs were made payable by Government.

The Collector being dissatisfied with this decree appealed to the Court of Sudder Dewanny Adawlut, and the cause came to a hearing before the Fourth Judge (S. T. Goad) on the 4th of April 1821. The decision of the Court below was affirmed on the following grounds, as recorded in the proceedings of the above date: The first and second grounds stated by the Officiating Judge of the Benares Court of Appeal, are sufficient to set aside the sale: but the first reason, namely, the non-payment of the prescribed deposit, is not entitled to any weight, because it is laid down in the 33d section of regulation 6, 1795, that in the event of a deposit of five (*a*) *per cent* on the amount of the purchase money being paid, and of the purchaser omitting to discharge the purchase money within the period which may be stipulated, he is to forfeit the deposit to Government, and the lands are to be resold at his expence, but it is no where provided that a sale shall be set aside by reason of part of the prescribed deposit not being made, supposing the purchase money to be duly discharged (*b*). The Fourth Judge too adduced

(a) Increased to fifteen *per cent* by section 2, regulation 12, 1796, and by section 14, regulation 11, 1822, the deposit may be at any rate that the Board of Revenue or other similar authority, may from time to time direct.

(b) Neither of these reasons would, under the present regulations, apparently VOL. III.

1821. another reason why the sale should be set aside, which reason did not appear to have been noticed in the decree of the Court below, and this was that the estate was advertised to be sold on the 21st of October, and the Acting Collector had carried the sale into effect on the 22d, without any fresh notice or advertisement of the postponement, which measure was clearly illegal and injurious to the interests of the defaulting proprietor, and indeed its illegality had been repeatedly recognized in the judgment of the Superior Court.

The Collector of Benares, and Birjuttun Das, s. Co. ex-Gir and Raj Gir.

1821.

KALI KHAN, Appellant,

versus

May 19th.

RAJAH MITTERJEET SING, Respondent.

Of two widows on whom their husband had settled his property in equal proportions, one dying, the other has no right of inheritance agreeably to the Moohummudan law; but the deceased widow's sister's son will take the property in default of nearer heirs.

THE respondent, former plaintiff, on the 11th September 1813, sued the appellant, in the Dewanny Court of Zillah Behar, for possession of one half of mouza Kutharee and three other mouzas situate in pergunna Sunwat, the annual produce of which was estimated at 1,050 rupees. The plaint was to the following effect:

The above mouzas were formerly a part of the plaintiff's estate. He disposed of them to one Bhuggoo Khan, who held possession from the year 1196 F. S., until the year 1206 F. S., when he died, leaving two wives, Mussumaut Pearee Begum and Mussumaut Ausima Khanum, heirs to his property. These women accordingly took possession, having appointed the defendant their agent. In the year 1211 F. S., Pearee Begum died, and Ausima Khanum continued in sole possession of the mouzas until 1217 F. S., when she sold them to the plaintiff, having procured his name to be substituted for her own in the Collector's books. The defendant presented a miscellaneous petition to the Zillah Court, praying that Ausima Khanum might not be allowed to sell the property to the plaintiff, on the plea that Bhuggoo Khan, who had adopted him (the defendant) had during his life time divided the above property between his two wives, and conferred the proprietary right on them, in lieu of dower, the first of whom, namely, Pearee Begum, was his aunt, and had assigned to him all her property. Upon this, an order was passed directing the defendant to prefer a regular suit agreeably to the regulations; this, however, he did not obey, but by creating disturbances greatly hindered the collection of the revenue, and both parties having applied to the Criminal Court for redress, a decision was given against the defendant, who, upon this, agreeably to section 23, regulation 9, 1807, appealed to the Court of Circuit. The Third Judge of that Court directed that the defendant should be put into possession of one-fourth of the property, and on a further appeal to the Superior Court, possession of one moiety was awarded to him, leaving the plaintiff at liberty to prefer a regular suit, which he now preferred accordingly. The

be sufficient to set aside a public sale, as by section 4, regulation 11, 1822, such sale cannot be annulled by any error, *irregularity*, or omission whatsoever, not involving the failure of one of the conditions specified in the different clauses of section 5, to be essential to the validity of public sales.

plaint further went on to state, that the defendant had no right to possession, for, although he would represent himself as being the adopted son of Bhuggoo Khan, according to law he has no hereditary right; again, if he called himself the nephew of Mussummaut Pearee, still according to the *furaiz*, or law of inheritance, he has no hereditary right to the property of his deceased aunt, and admitting also that Mussummaut Pearee had made over to him, as a free gift, all her share, yet, as there had been no regular division of the property, such disposition on her part was illegal; that the defendant, during her life time, was never in possession, which proves the deed of gift set up by the defendant to be invalid, and that the property of Mussummaut Pearee, owing to her leaving no heir, necessarily escheated to Government, by whom a settlement had been made with the plaintiff, who is, according to section 6, regulation 1, 1793, the only lawful proprietor.

1821.

Kali Khan,
v. Rajah
Mitterjeet
Sing.

The defendant replied in the following terms :

If the disputed property had, as the plaintiff states, been for a great length of time a part of his hereditary estate, how was it that in the Collector's books the name of Bhuggoo Khan was inserted, and not that of the defendant? again, the plaintiff rests his claim upon the purchase made by him of the share of Pearee Begum, together with the other lands from Ausima Khanum; the legality of the sale, however, on the part of Ausima, rests on her right to the lands sold, which right she did not possess according to the laws of inheritance. The deed of sale was therefore illegal. The true state of the case is as follows; Bhuggoo Khan having given the lands in question to his two wives, in lieu of dower, in the year 1207 F. S., together with other property real and personal, they took possession accordingly. Pearee, the defendant's maternal aunt, during the life time of Bhuggoo Khan, after she had taken possession of her share, having adopted him, gave to the defendant, and put him in possession of her property real and personal, including her share of the lands. The widows were in separate possession of their respective shares, and consequently in virtue of the deed of gift the defendant has a right to the share of Pearee, independently of which, however, he was, by law, heir to her property.

On the 24th of February 1816, the register of the Zillah Court decreed in the following terms; In a former suit instituted for mesne profits, the present plaintiff was then plaintiff, and the present defendant, together with two others, were the defendants. A copy of the decree in that case, bearing date the 12th of May 1814, has been produced in the present investigation by the plaintiff. From this decree it appears, that after all due investigation into the statements of both parties, the right of the plaintiff to possession of the moiety of the mouzas in dispute was fully established. He ordered, therefore, that, agreeably to the opinion expressed in the above decree, the plaintiff be put in possession of the above mouzas, and that the costs of suit be defrayed by the defendant. The defendant then appealed to the Provincial Court at Patna; and on the 2d of June 1818, the Second Judge, on the same grounds, confirmed the Register's decision of the 24th of February 1816, dismissed the appeal,

1821. and adjudged the costs of suit, in both Courts, to be paid by the appellant.

Kali Khan,
v. Rajah
Mitterjeet
Sing.

The appellant then petitioned the Court of Sudder Dewanny Adawlut for the admission of a special appeal, which being granted, the case came to a hearing before the Third Judge (S. T. Goad), to whom it appeared necessary in the first instance, that the following questions should be put to the law officers of this Court; Is Ausima Khanum, according to law, heir to the property of Pearee Begum, her rival wife, and in case she be not, is the appellant, who is her nephew or son of her sister, her legal heir? On the 22d of January 1821, the desired *futwa*, together with the documents filed in the Provincial Court, and pleadings of both parties in this Court were read. It appeared from these papers that the decree of the Provincial Court had partly been founded on the erroneous supposition that the former cause relative to mesne profits had never been appealed, whereas, it appeared, from the copy of a petition of appeal, where Kali Khan was appellant, and upon the top of which was written an order admitting the appeal, dated the 1st of December 1814, that such was not the case. It also appeared, that it been referred back for further investigation; and that the final disposal of it was postponed for the decision of this case.

The answer of the law officers of this Court to the question proposed was to the following effect: Ausima Khanum has no right to any part of the property left by Pearee Begum, her rival wife, and as they are the only two widows of Bhuggoo Khan, and as the appellant is the only relation of Pearee Begum living, he has an hereditary right to her share, that is, one half of the property of Bhuggoo Khan, the other half being the portion of Ausima Khanum. Under these circumstances, the Third Judge recorded his opinion, that the appellant should be put in possession of the disputed property, that the proceeds of that portion from the time of his dispossession, to the present period, should be refunded, and that the costs of suit should be defrayed by the respondent.

On the 19th of May, the papers in the case being taken up by the Officiating Judge (W. Dorin) he recorded his concurrence with the Third Judge to the following effect:

It appears that the Second Judge of the Provincial Court having made a former decree of the Register the groundwork of his own decision, confirmed the decree of the Zillah Court. The former decree by the Register was in the case of the respondent (then plaintiff) suing the present appellant, and two other persons, for 485 rupees, 4 anas, the proceeds of the present disputed property for the year 1218 F. S. It might be said that the Register had power to decide this case, and as the Second Judge supposed that the case had not been appealed, he considered the Register's decision as final. It appears, however, from the order written on the petition, a copy of which forms a part of the proceedings of this case, that on the 1st of December 1814, the case was appealed, and it does not appear that up to the present day any decision has been passed; as far, however, as regards the present case, it appears that the disputed share, together with the other moiety, were formerly in the possession of one Bhuggoo Khan, who during his life time divided it equally between his two wives, Pearee Begum and

Ausima Khanum. Pearee subsequently died, leaving her nephew her heir, and the respondent's claim is founded on his having purchased both shares from Ausima. The appellant, however, denies the right of that woman to sell both shares. As then the law officers of this Court have declared the appellant, independently of the deed of gift, to possess the hereditary right to one moiety, the claim of the respondent cannot be upheld. It is here worthy of mention, that at the time of the above decree, under date the 12th of May 1814, it was not competent to the Register to decide cases beyond the amount of 500 rupees; and although the sum sued for nominally was not more than 500 rupees, yet as the investigation involved the question of proprietary right, it was really much more. The question of proprietary right, moreover, was under appeal, and it certainly was not proper for the Register to decide in the *interim* a case of mesne profits of that self-same property before the decision of the Court of Appeal was known. It was finally ordered, therefore, that the decisions of the Courts below be reversed, that the costs of suit in all three Courts be charged to the respondent. That the appellant be put in possession of the moiety in dispute, and that he receive from the respondent the proceeds of the said moiety from the time of his dispossession (a).

1821.

Kali Khan,
v. Raja
Mitterjeet
Sing.

GOPEE CHURUN BURRAL, Appellant,

1821.

versus

MUSSUMMAUT LUKHEE ISHWUREE DIBIA, and RAO
RAM SING, (Guardian of the Minor, SURUSWUTEE DIBIA),
Respondents.

June 5th.

ON the 27th of March 1810, Gopee Churun Bural sued Lukhee Ishwuree, and the minor widow of her son (Suruswutee Dibia), zemindars of pergunna Museeda, &c. and Neelkaunt Surma and Nundkoomar Surma, the former agents of those individuals, in the Zillah Court of Dinagepoor, to recover the sum of 4,940 rupees, being the principal and interest of a debt on bond.

The plaint set forth, that in the month of *Jeth* of the Bengal year 1219, Lukhee Ishwuree deputed the defendants Neelkaunth Surma and Nundkoomar Surma from Moorshedabad, with a power of attorney to borrow on her account, from the house of the plaintiff, the sum of 4,000 rupees, for the purpose of discharging the arrears of revenue which had accrued on the pergunna of Museeda; that they accordingly, on the 25th of the above month and year, borrowed the money from the plaintiff, executing a bond for the amount, which bond, after it was duly registered, they delivered to the plaintiff, together with the power of attorney under which they had borrowed it; that subsequently to this transaction the name of Mussummaut Suruswutee had been registered as pro-

Money having been borrowed to discharge arrears of government revenue, by a person erroneously registered as proprietor of an estate, the rightful proprietor, on coming into possession will be held liable for the debt: and this is conformable to

(a) In this case the appellant came under the description of that class of heirs who rank third among the distant kindred, and who take the estate in default of those heirs who are technically termed legal sharers and residuaries.—See *Principles and Precedents of Moohummudan Law*, page 8, §§ 45.

1820. proprietor of the above pergunna in lieu of that of Lukhee Ishwuree.

Gopee Chur-
run Bural,
v. Mussum-
maut Luk-
hee Ish-
wuree Dibia
and Rao
Ram Sing.

The plaintiff went on to state, that the sum now claimed was for the principal and interest which had accrued on the debt, and prayed further that interest might be awarded up to the date of the decision. The defendants, Neelkaunth Surma and Nundkoomar Surma, in their reply, admitted the justice of the demand; but the other defendants did not appear.

On the 13th of June 1816, the Zillah Judge passed a decree to the following effect: It has been established by the evidence of the witnesses and the documents adduced in this case, that the sum claimed by the plaintiff was really lent by him in the mode stated, and paid into the Collector's office on account of the revenue of pergunna Museeda. When this transaction took place Lukhee Ishwuree was registered as proprietor of that pergunna. She is living with Suruswutee Dibia as a joint and undivided family. The plaintiff advanced the money under the belief that Lukhee Ishwuree was proprietor of the pergunna, a supposition which was justified by her having been recognized as such by the officers of Government, although, at that time, Suruswutee Dibia was not recognized as proprietor, yet she was, in point of fact, the proprietor all along, and now that she has been formally acknowledged as such, she cannot have any reasonable pretext for refusing to discharge the just demand of the plaintiff; she being in reality the person benefited. Had she not been conscious of her inability, she would unquestionably have appeared to answer the claim. It does not seem necessary to enter into any particular enquiry as to the cause of the transfer of the proprietary right. It is indeed clear that the name of Lukhee Ishwuree was inadvertently registered as proprietor. Suruswutee Dibia should consider herself to stand in the same predicament as if the estate had devolved upon her by right of inheritance; but should she, being dissatisfied with this order, appeal from it to a superior tribunal, and should her appeal prove so far successful as to exonerate her from the liability to which she is now considered subject, and should Lukhee Ishwuree not possess assets to meet the plaintiff's demand, he will then be at liberty to come upon the authorities by whose error, in registering the estate of one individual in the name of another, he was induced to advance his money. Both the defendants, Lukhee Ishwuree and Suruswutee Dibia, for the reasons above stated, were included in the judgment, and they were ordered to pay to the plaintiff the sum of 4,000 rupees with interest, at the rate of twelve *per cent*, from the date of the bond to the date of the decree; which amounted to 1,568 rupees. They were further adjudged to pay the costs of suit, and the plaintiff was directed to file a supplementary plaint on a separate piece of stamp paper, corresponding in amount to the additional interest decreed, which he did accordingly.

An appeal having been preferred by the guardian of Suruswutee Dibia from the above decision to the Provincial Court of Moorshedabad, the Third and Officiating Judges of that Court, on the 16th of May 1819, passed a decree amending that of the Zillah Court, exonerating Suruswutee Dibia from the demand, and making Lukhee Ishwuree solely liable for the debt, on the ground that the

former had neither received the money borrowed, nor authorized the execution of the bond. 1821.

A petition for a special appeal against this judgment was presented by the creditor Gopee Churun Bural; and the Judge to whom it was presented deemed it expedient to take the opinion of the Pundits on the following question : Gopee Churun Bural, v. Mussum-maut Lukhee Ishwuree Dibia and Rao Ram Sing.

Lukhee Ishwuree, at the time of her being registered as proprietor of pergunna Museeda, borrowed four thousand rupees for the purpose of paying arrears of revenue, which had accrued on the above estate, and *bond fide* applied the money borrowed to that purpose; subsequently to this transaction Suruswutee Dibia (the minor widow of her son) was registered as proprietor. Under these circumstances, is the latter individual liable for the payment of the debt by reason of her having come into the possession of the landed property, for the purpose of discharging the arrears on which the money had been borrowed? The reply to this question being in the affirmative, it was deemed equitable to admit the special appeal, and it was admitted accordingly. Rao Ram Sing (the guardian of the minor Suruswutee Dibia) appeared to answer the appeal. Lukhee Ishwuree did not appear. On the 14th of May 1821, the cause came to a hearing before the Second Judge (Courtney Smith), who recorded his opinion to the following effect: This case involves a simple question as to the rights of debtor and creditor, rather than a question of inheritance; and therefore there was no apparent necessity for taking the opinion of the Pundits on the point of Hindoo law; nevertheless, their opinion, that Suruswutee is liable for the debt specified in the bond, seems conformable to reason and good sense. She ought to be held liable, and so ought Lukhee Ishwuree; they should be considered to be jointly and severally responsible. The judgment of the Zillah Court appears to have been in every respect sound and reasonable, and should not have been disturbed by the Court of Appeal. At the same time, the Second Judge recorded his opinion that Suruswutee Dibia should be considered at liberty to sue Lukhee Ishwuree for the recovery of the amount, after she had reimbursed the appellant. On the 5th of June the cause came on again before the Third Judge (S. T. Goad), who briefly expressed his concurrence in the judgment of his colleague. A final decision was accordingly passed, annulling that of the Moorshedabad Court of Appeal, and affirming the decree of the Zillah Judge; and it was adjudged that Gopee Churun Bural should recover the sum of 4,000 rupees, with interest at the rate of 12 per cent per annum on that sum, up to the day of payment, from Lukhee Ishwuree or Suruswutee Dibia, or from both of them; and that the estate registered in the name of the latter individual should be sold in satisfaction of the debt, in the event of its not being liquidated without delay. Suruswutee Dibia was further made liable for the costs incurred in the Provincial Court and Sudder Dewanny Adawlut.

1821.

JEETUN DAS, Appellant,

versus

June 18th.

LAL ROODUR PURTAB SINGH, Respondent.

A bond having been executed before the 1st of Jan. 1804, bearing interest at the rate of 12 per cent per annum, and subsequently to that period a second bond, (the first remaining uncanceled) for the same debt at a higher rate, held that agreeably to regulation 35, 1803, the legal interest is not thereby forfeited.

IN the year 1860 of the *Sumbut* æra, corresponding with the year 1803 A. D., Rajah Lal Isruj Singh, since deceased, the father of the respondent, borrowed from the banking house of the appellant the sum of 15,000 rupees, and gave a bond for the payment of the amount, with interest at the rate of one *per cent per mensem*, with an engagement that the money should be repaid within the period of four months from the execution of the bond; but on the expiration of the above period, not being able to make payment, he executed a fresh obligation on the 1st of *Asarh* 1861 *Sumbut*, for the sum of 15,750 rupees (being the amount of the principal and interest of the former bond), bearing interest at the rate of one rupee, four anas *per mensem*, and assigned over to the house of Sahoo Bullum Das, and Dwarka Das, in trust for the benefit of the appellant, the rents of mouza Sursa and nine other mouzas situated in pergunna Chowrasee, which lands were let in farm to one Sewun Lal at an annual *jumma* of 10,000 rupees, payable by eight different instalments. In consequence of this assignment the appellant received at different intervals the sum of 7,133 rupees, 4 anas, through the house of Sahoo Bullum Das and Dwarka Das, in part payment of his debt; but Rajah Lal Isruj Singh subsequently dying, and leaving his son, the respondent, in a state of minority, his landed property was taken under the care of the Court of Wards. The appellant applied to the Collector for payment of the debt due to him, but he was informed in reply, that his demands could not be attended to until the estate had been cleared of the other mortgages with which it was encumbered. The appellant on these grounds instituted an action in the Benares Court of Appeal on the 1st of July 1815, against the respondent, and the Collector of Zillah Allahabad, claiming the sum of 22,866 rupees, 12 anas, being the principal and interest to an equal amount (deducting the sums already received), of the debt incurred in the manner above stated. Lal Rooder Purtab Singh was not forthcoming to answer the demand, and it appearing that he had attained the age of majority, and had come into possession of his estate; the Collector was of course exempted from all participation in the case.

This cause came to a hearing on the 4th of July 1818, and the following was the substance of the decree passed by the Officiating Judge of the Benares Court: It appears that the plaintiff took from Rajah Lal Isruj Singh a bond for the sum of 15,000 rupees, and afterwards another bond for 15,750 rupees, by adding five months interest to the principal of the original bond. The original bond therefore became cancelled, and in its stead a second obligation was executed, in which it was stipulated that any part of the debt remaining unpaid at the end of *Jeth* 1861 *Sumbut*, should bear interest thenceforward at the rate of one rupee four anas *per mensem*. The date of the execution of the second bond is the 15th of November 1803, or eight months subsequent to the promulgation of regulation 34, 1803, which provides that the Courts are not to decree any interest whatever in any case

where the bond shall specify a higher rate of interest than is authorized by that regulation. Now it appears that the plaintiff has acted wilfully in contravention to the provisions of this enactment, for the 1st of *Asarkh* 1861, *Sumbut*, corresponds with the 24th of June 1804, A. D., and it is clearly laid down in the regulation above quoted, that after the 1st of January 1804, no higher rate of interest than twelve *per cent per annum* shall be allowable. The plaintiff therefore is not entitled to any interest, from the fact of his conduct having amounted to an infringement of the regulations, and what he has already received as interest should be deducted from the principal debt, which will leave the sum of 8,616 rupees, 12 anas, to be received by him. This sum was accordingly adjudged to be paid by Lal Rooder Purtab Singh, and the costs were made payable by the parties respectively.

1821.

Jeetun Das,
v. Lal Rooder
Purtab Singh.

Jeetun Das being dissatisfied with the above decision, appealed from it to the Court of Sudder Dewanny Adawlut. The cause came to a hearing, in the first instance, on the 18th of June 1821, before the Officiating Judge (W. Dorin) who recorded his judgment to the following effect: The claim of the appellant appears to be founded on the second obligation executed by the respondent's father. Its authenticity is indisputable. The point for consideration is whether or not the appellant should have interest awarded to him in addition to the principal of his debt. The Officiating Judge of the Court below seems to have been of opinion that all interest should be forfeited, it having been stipulated to be paid at the rate of 1 rupee, 4 anas, *per mensem*, in opposition to the provisions of regulation 34, 1803. The case must certainly be tried agreeably to the provisions of the above mentioned regulation, because both the bonds were executed in the district of Allahabad, and not in the city of Benares; but the third section of the enactment above quoted has this provision, that if the cause of action shall have arisen on a date subsequent to the tenth day of November one thousand eight hundred and one, the Courts are not to decree any interest whatever above the rate of twelve *per cent per annum*; and by the seventh section of the same enactment it is provided that the Courts are not to decree any interest whatever in any case where the bond or instrument given for the security and evidence of the debt shall have been granted on a date subsequent to the first day of January one thousand eight hundred and four, and shall specify a higher rate of interest than is authorized by section 3, of that regulation. But the first bond is dated the 15th of November 1803, that is before the 1st of January 1804, and the creditor therefore appears to be entitled to recover interest equal to the principal of his debt, because the rule contained in the above provision has reference only to bonds executed after the 1st of January 1804, and can by no means warrant an order for the total forfeiture of interest in this case. The decree of the Court below should therefore be amended; and the amount of principal and interest claimed by the appellant should be awarded to him. It was further incidentally remarked by the Officiating Judge, that even admitting the propriety of the order for the forfeiture of interest, agreeably to the rule contained in section 7, regulation 34, 1803, still it was not legal to direct a refund; or to

1821. make a deduction on that account from the principal; on the ground of the receipt of any part of the interest which had been stipulated for at a higher than the authorized rate, there being no part of the enactment in question which could justify such an order.

Jeetun Das,
v. Lal Roodur
Purtab Singh.

(On the same day the case having been brought before the Third Judge (S. T. Goad), he expressed his entire concurrence in the above opinion, observing that the second obligation was not intended to cancel, but was rather admiacular to the original bond, an inference which was supported by the fact that the latter instrument continued in the possession of the appellant after the execution of the former, which did not fall within the provisions of section 7, regulation 34, 1803. The decree of the Provincial Court was therefore amended, and the respondent was adjudged to pay to the appellant the sum of 14,202 rupees, being the balance of the claim preferred by him on account of principal and interest, after deducting the sums already received. The costs of both Courts were made payable by the respondent.

1821.

MEER ASHRUF ALI, Appellant,

versus

July 9th.

MUSSUMMAUT GOURMUNEE and others, Respondents.

In a suit brought by certain joint Hindoo proprietors, against the Collector and the surety of their co-partner (who was treasurer, and had defaulted and absconded) for the recovery of their shares of the joint property, which had been sold on account of the defalcation, judgment in favour of plaintiffs, and held that the surety was solely liable;

THE plaintiffs in this case were Mussummaut Kishoree, widow of Meghoo Sah and mother of Cheitun Sah deceased, and Mussummaut Birjmunee and Mussummaut Gourmunee, widows of Cheitun Sah; and the claim was to recover one third share of the joint property appertaining originally to the three brothers, Ramdas Sah, Meghoo Sah, and Kishenchunder Sah. The claim was instituted on the 31st of January 1817, *in forma pauperis*, in the Dacca Provincial Court, and the property claimed on the above account was valued at 17,500 rupees.

It was set forth in the plaint, that Meghoo Sah (the husband of one and father-in-law of the other two plaintiffs) and Ramdas Sah and Kishenchunder Sah, were three brothers, who lived as a joint and undivided family, and who carried on trade together by means of the fortune which they had inherited from their father. The affairs were conducted in the names of Ramdas Sah, and Meghoo Sah, and they had extensive dealings in Dacca, Moorshedabad and other cities. By these means they acquired considerable property in money, lands, jewels, &c. amounting in value to about a lakh and a half of rupees. Meghoo Sah died, leaving a son (Cheitun Sah) who was married to the plaintiffs, Gourmunee and Birjmunee, and Ramdas Sah having also subsequently died, the business was conducted in the name of Kishenchunder, by reason of the minority of Cheitun Sah. On the death of Kishenchunder his son, Suroop Sah, and Cheitun Sah purchased a commodious house in the city, and set up as bankers under the firm of Cheitun and Suroop, and

acquired considerable property. In the year 1211 B. S., Cheitun died, and Suroop, with the plaintiffs permission, retained the exclusive management of the banking and household concerns. In 1214 B. S., he became treasurer to the Collector of Dacca-Jelaipore, under the security of Meer Ashruf Ali and Moulvee Hafeezoolah, and in the year 1221 he absconded with large sums of the public property, upon which the sureties caused the whole joint property, moveable and immoveable to be sequestered, including even the jewels and the other peculiar property belonging to the plaintiffs. The plaintiffs objected to this proceeding, by a summary application to the Zillah Court, but their application was unattended to. The Provincial Court deeming the case such as to warrant a summary enquiry, directed the Judge to make it accordingly, but their order was reversed on appeal by the Sudder Dewanny Adawlut, and the plaintiffs were referred to a regular suit. The property was accordingly sold by public auction, and the proceeds deposited in the Collector's treasury. Moulvee Hafeezoolah replied by alleging that he was merely a nominal surety, and that although his name was coupled to that of Ashruf Ali in the security bond, yet that it was merely for the sake of form; that he had received an indemnity bond from that individual, and that he had nothing to do with the sequestration and sale of the defaulter's estate. The Collector urged in answer that no responsibility rested with him; the property which was seized having been pointed out by the sureties of the defaulter, as belonging exclusively to him, and they having undertaken to answer the demands of any claimants who might subsequently appear. The remaining defendant, Ashruf Ali, replied that all the property which had been pointed out by him and sold in consequence of the defalcation of Suroop, did *bona fide* belong exclusively to that individual, that no part of it was joint property, for that Meghoo Sah had been dead for 35 or 36 years, and Cheitun Sah for 14 or 15, and that the latter person moreover was insane, blind, and wholly incompetent to be a partner in any business. On the 24th of January 1820, the Senior Judge of the Provincial Court having ascertained from his Hindoo law officer that, of the property originally held jointly by Meghoo, Raudas, and Kishenchunder, Cheitun Sah, the son of the first named individual, was entitled to one-third; and that after his death, his widows Birjmunee and Gourmunee were entitled to the same portion, subject to the maintenance of his mother Kishoree, and it being proved that from the property sold the sum of 32,797 rupees, 2 anas, 18 pies, had been realized, he decreed that the sum of 10,932 rupees, 6 anas, 8 pies, or a third of the sum realized, should be paid to the plaintiffs by the surety, Ashruf Ali, conceiving that the Collector and Hafeezoolah should be exonerated from all responsibility, the pleas which they had respectively adduced being fully established and admitted by the other defendants. Ashruf Ali was ordered to pay all their costs, besides a proportion of those incurred by the plaintiffs. An appeal to the Sudder Dewanny Adawlut from this decision having been preferred by Ashruf Ali, the case was brought to a hearing before the Third Judge (S. T. Goad) on the 9th of July 1821, and the judgment of the Court below was affirmed; it appearing that although on the death of Cheitun, the partnership between

1821.

Meer Ash-
ruf Ali, v.
Musam-
maut Gour-
munee and
others.

1821.

Meer Ash-
ruf Ali, v.
Mussum-
maut Gour-
munee and
others.

him and Suroop was *ipso facto* dissolved, although his heirs could not be held to be sharers of the profits and losses of the survivor, and although it was probable Suroop had added considerably to his acquisitions since the death of his partner, yet the appellant had never given in a true inventory, and had unjustly caused the whole to be sold without any regard to the rights of the heirs of the deceased partner. On this ground the award seemed equitable. The costs of appeal were made payable by the appellant.

1821.

July 17th.

RAMDHUN SEIN and others, Appellants,

versus

KISHENKANTH SEIN and others, Respondents.

In a suit by a Hindow for a share of his maternal grand-father's property, held that the rule of limitation should be reckoned from the period of his mother's or his grand-mother's death, and not from that of his grand-father's second widow, who had got possession under a decree of Court, the right having begun to accrue on the death of the former persons.

Maternal grandsons by different mothers take *per capita* and not *per stirpes*.

ON the 28th of December 1811, Ramssoonder Sein, the father of the respondents, sued the appellants and Kishnanund Sein, in the Zillah Court of Backergunge, to recover a one ana, six gundah, two cowrie, two krant share of certain talooks situated in that zillah.

The plaint was to the following effect: A moiety of the talook, known by the name of Mahadeo Moonshee, situated in pergunna Futtahjungpoor and other talooks, was the property of Cubbee Ruttun Rai, and after his death his three sons, Kamdeo, Ramakanth and Ramnath succeeded him. On their death the property went, agreeably to the laws of inheritance, to their surviving heirs in the following proportions: to Hurreepershad, son of Ramakanth, a five ana, six gunda, two cowrie, two krant share; and to their uncle Rampershad, the plaintiff's maternal grandfather, a two ana, thirteen gunda, one cowrie, one krant share. This Rampershad had six wives, four of whom died childless. By his wife Purumesree he had a daughter named Surva Mungla, mother of the plaintiff; and by his wife, Puddummookhee, he had a daughter named Kishenpria, the mother of the defendants. On the death of Purumesree (who had succeeded to her deceased husband) the aforesaid Hurreepershad, a relation of the male branch of the family, seized upon his portion; and as the plaintiff was not the next heir, he could not sue in his own right, but he and Kishnanund prompted the other wife (Puddummookhee) to come forward and assert her right in a court of justice, which she did accordingly, and obtained a decree in her favour on the 28th of May 1784, corresponding with the Bengal year 1191. The plaintiff was shortly afterwards compelled to abscond owing to the pressure of his debts, but he was continually in the habit of receiving remittances from the estate. These, however, having since been discontinued, he sued for his separate share of the property, which was one moiety of that enjoyed by his maternal grandfather Rampershad. The defendants replied by stating, that both the grandmother and mother of the plaintiff had died before Rampershad, the maternal grandfather of the parties, and the grandmother of the defendants had survived him, and had been in possession of the estate for

forty-two years; that she had made a gift to them (the defendants) of the property which had devolved on her; and that they had been in possession in virtue of the gift for a period of twenty-one years.

On the 10th of June 1815, the Zillah Judge dismissed the claim, considering that there was sufficient evidence to raise a presumption that the plaintiff's mother and grandmother died before the husband of the latter, and on the ground that after the death of Rampershad (maternal grandfather of the parties), his second wife Puddummookhee (grandmother of the defendants,) obtained possession of the property, and made a gift of it to them, and that the plaintiff had never advanced any claim since the death of his maternal grandfather, which happened in the Bengal year 1191.

The plaintiff being dissatisfied with the above decision, appealed to the Dacca Provincial Court, and dying, was succeeded in the appeal by his sons Kishenkanth, Radhakanth and Nubkiahore. On the 15th of June 1819, the Senior and Officiating Judges of that Court, for the reasons stated in their proceedings, reversed the decree of the Zillah Judge, and awarded to the appellants possession of the share claimed.

A special appeal was subsequently admitted by the Court of Sudder Dewanny Adawlut, on its appearing from an opinion delivered by the pundits, in answer to a reference made to them on this occasion, that the decision of the Court below was at variance with the principles of the Hindoo law. They were asked if Puddummookhee was competent to dispose of by gift to the sons of her daughter the property which had devolved on her at her husband's death, notwithstanding the existence of Ramssoonder, the daughter's son of her rival wife; and if not, to what portion of the estate left by his maternal grandfather was the said Ramssoonder entitled? To the first part of the question the reply was in the negative, and to the second that Ramssoonder was entitled to an equal share with the other grandsons. On the 13th of June 1821, the cause came to a hearing before the Second Judge (Courtney Smith) who gave judgment to the following effect: It appears that Surva Mungla, the daughter of Purumesree, wife of Rampershad, the maternal grandfather of both parties, had one son named Ramssoonder, the father of the respondents; and that Kishenpria, the daughter of Puddummookhee, the other wife of Rampershad, had four sons, namely, Kishannund, Ramdhun, Hurannun, and Mud-denmohun, of whom the first and last have since died childless. Here then were three grandsons living, and admitting the property to have formed a fit subject of distribution, yet it appears that the award of the Provincial Court was not legal, for the estate should have been made into three equal shares and allotted to the three grandsons accordingly. On this ground alone, therefore, the decree of the Provincial Court, which assigned one out of two shares to Ramssoonder, should be set aside. The decree of 1784 or 1191 B. S., awards the entire portion of Rampershad to his widow Puddummookhee, without making the slightest allusion to any other sharer or claimant. It recites, also, that five of the six wives of Rampershad had died, and, from the date of the passing of that decree up to the time when Ramssoonder came forward with

1821.

Ramdhun
Sein and
others, v.
Kishen-
kanth Sein
and others.

1821. his complaint, in the year 1219 B. S., (which comprises a period of twenty-eight years), it does not appear that any claim was ever laid to the property which had devolved on Puddummookhee at the death of her husband Rampershad. The Judges of the Dacca Court of Appeal seem to have made a capital error in supposing Ramsoonder's cause of action not to have originated until the death of Puddummookhee, which occurred in the year 1211 B. S. In point of fact, it originated on the death of his mother Surva Mungla, or of his grandmother-Puramesree, both of which events occurred antecedently to the passing of the decree in the year 1784; and although there is no evidence before the Court as to the actual dates of these events, yet it is certain they died a long time (thirty or forty years) ago, and probably in the life time of Rampershad the maternal grandfather of Ramsoonder. The story set up by Ramsoonder as to his having enjoyed at one time some portion of the profits, was considered by the Second Judge as wholly unproved, and as being merely a common-place device, to prevent the rules of limitation from operating. The Second Judge was of opinion that this claim should be held to be barred by the rules of limitation. The Third Judge (S. T. Goad) having concurred in the above opinion, a decree was passed accordingly, reversing the decision of the Provincial, and affirming that of the Zillah Court. Costs and mesne profits were made payable by the respondents.

1821.

HUKEEM WAHID ALI, Appellant,

versus

Aug. 6th.

KHAN BEEBEE, Respondent.

According to the rules of Moohummudan law, it is necessary that the plaintiff should adduce evidence to prove his claim on simple denial by the defendant; but when any special plea is urged, the *onus probandi* rests with the defendant.

THIS was a claim instituted by the respondent in the Bareilly Provincial Court, on the 8th of December 1818, against the appellant, *in forma pauperis*, to recover possession of seven houses, with the ground attached thereto, situated in Mohulla Nulla, in the town of Bareilly, the computed value of which was 6,001 rupees.

The claim set forth, that these houses were built by one Bazeed Khan, the father of the plaintiff, on whose death Anwur Khan, the brother of the plaintiff, took possession of the property, in virtue of his right of inheritance, and on the death of Anwur Khan it was most unjustly and forcibly taken possession of by Hukeem Wahid Ali, on the plea that he was the grandson of Bazeed. Moohummud Yar Khan, the son of Khoda Yar Khan, however, instituted a suit against him, and obtained a decree in his favour, reciting that Wahid Ali should give up to him (Yar Moohummud) the houses and all the profits realized therefrom; and that Yar Moohummud should make a distribution of the property, agreeably to the laws of inheritance among his brothers and sisters, the plaintiff (Khan Beebee) and the other heirs of Bazeed. Wahid Ali being dissatisfied with the above decision appealed to the Court of Sudder Dewanny Adawlut, by the Judges of which Court it was reversed, on the ground that Khoda Yar (the father of Moohummud Yar) was not the son of Bazeed, but of his wife by a former husband; and of his having consequently no legal claim to the property of that

individual. It was provided, however, in the decree, that the other heirs of Bazeed, were of course at liberty to come forward and establish their rights, but the plaintiff being at that time extremely poor was unable to do so.* It was contended, on behalf of the plaintiff, that the defendant, although the son of Bazeed's daughter, was not legally entitled to inherit, he being excluded by reason of his mother having died before her parents, and that the plaintiff was the sole legal heir.

1821.

Hukeem
Wahid Ali,
v. Khan
Beebees.

The defendant urged in reply, that the plaintiff's mother was the daughter of one Rai Bail, who was the concubine or *hurum* of Bazeed, and the slave girl of the defendant's grandmother, and never married to his grandfather, and consequently, that the plaintiff was wholly incompetent to inherit; that the whole property of Bazeed was absorbed in satisfaction of the debt of dower due to his (the defendant's) grandmother: that a period of five-and-twenty years had elapsed since the death of Bazeed, during all which time the plaintiff had never advanced any claim to the property left by him; that the dower due to the defendant's grandmother amounted to 50,000 rupees, in addition to which she was entitled to one-eighth, in virtue of the right of inheritance, if the estate of Bazeed afforded any assets after satisfying her claim of dower (claims of dower being preferable according to the Moohummudan law to claims of inheritance), and lastly that he (the defendant), as son of her daughter, ranking among the distant kindred, was entitled to her property, there being neither legal sharers nor residuaries in existence.

After weighing the evidence adduced in this case, the Senior Judge of the Bareilly Court of Appeal, on the 26th of July 1819, recorded his opinion that the allegations as to the plaintiff's mother being a slave girl, and as to the property of Bazeed being absorbed in the debt of dower, due to the grandmother of the defendant, were not proved; and he considered it established, that when Bazeed died he had three heirs, namely, his first widow, the grandmother of the defendant, his second widow, the mother of the plaintiff, and the plaintiff herself. The estate therefore of that individual, he was of opinion, should be made into sixteen parts, of which one share should go to the defendant in right of his grandmother, she having been entitled to a sixteenth as widow, one share to the plaintiff in right of her mother, she also having been entitled to one-sixteenth as widow, and the remaining fourteen shares to the plaintiff in her own right, she having been entitled as daughter, to one-half as her legal share, and to the other six shares as the return, there being no other legal sharer or residuary to claim it (a). The plaintiff therefore was declared entitled to fourteen out of sixteen shares.

An appeal having been preferred from the above decision to the Court of Sudder Dewany Adawlut; the Second Judge (Courtney

(a) The property should originally have been made into eight parts, of which the two widows were entitled to an eighth between them, but one not being divisible between them without a fraction, it became necessary to augment the number to sixteen agreeably to the third Principle of Distribution. See *Principles and Precedents of Moohummudan Law*, page 15; §§ 77; and for the doctrine of the return, page 23, §§ 33.

1820. Smith) before whom the case came to a hearing on the 1st of May 1821, expressed himself of opinion that the evidence adduced in the Court below preponderated in favour of the allegations of the appellant, as to the origin of the respondent, and as to the dower due to the appellant's grandmother, and he recorded his judgment to the effect that, even admitting the respondent to have legally possessed a right of inheritance, she had forfeited that right by lapse of time; as Bazeed, whose estate she claimed in virtue of inheritance, had been dead upwards of thirty years, and as the appellant had been in possession for eighteen years before she had ever advanced any claim, and, consequently, that according to the limiting regulation, 2nd of 1805, the claim was in the first instance inadmissible. The case having been referred for the opinion of another Judge, and there appearing to exist some evidence, though not of a very direct or positive nature, that the mother of the respondent was married to the original proprietor Bazeed, it was deemed necessary to propound the following question to the law officers of the Sudder Dewanny Adawlut:

Hukeem
Wahid Ali,
v. Khan
Beebee.

'A plaintiff claims the property of a person named Bazeed Khan, five-and-twenty or thirty years after his death; alleging that she is his daughter. The defendant, in reply, pleads that Mussumnaut Rai Bail, the mother of the plaintiff, was the *hurum* (concubine) of her father, and the slave of Burree Beebee his wife, and that she was never married to Bazeed Khan. One witness adduced by the plaintiff states his conjecture that a marriage took place. Under these circumstances, is the claim of inheritance set up by the plaintiff established? And on which of the parties does the *onus* legally lie of proving or disproving the marriage; on the plaintiff who makes the claim, notwithstanding the admission of concubinage by the defendant? or will the law presume the marriage of Rai Bail, until disproved by the defendant?

The following was the substance of their reply: The plaintiff five-and-twenty or thirty years after the death of Bazeed Khan has sued the defendant for the property left by that person, alleging that she possesses the right of inheritance as his daughter. The defendant in answer, pleads that Mussumnaut Rai Bail, the mother of the plaintiff, was the *hurum*, or Concubine of Bazeed Khan, and the slave of his wife Burree Beebee, and that she was never married to Bazeed Khan. This answer involves a denial of the plaintiff's having any right of inheritance as daughter, by reason of her mother not having been married to Bazeed Khan; and it further contends that plaintiff's mother was the slave of the wife of Bazeed Khan, and the concubine of that person. According to the Moohummudan law, it is necessary, in all claims, that, after the defendant has denied the claim, the plaintiff should prove it; and it certainly is not incumbent on the defendant to prove the invalidity and insufficiency of the plaintiff's claim, which amply appears from his denial; except in a case where the defendant urges a plea to repel the claim of the plaintiff, on proof of which plea the original claim of the plaintiff falls to the ground, and which plea involves a partial admission of the plaintiff's claim. In such case, it becomes requisite for the defendant to establish his plea. For instance, Zeyd sues Omar for a debt of one thousand rupees, and

Omar, with a view to repel the claim, pleads repayment of the money borrowed. In this instance it is incumbent on Omar to prove the repayment, which, if he should fail to do, the claim of Zeyd to the sum in dispute will be established; because the plea of Omar involves an admission that the debt was originally incurred. It would have been otherwise had the plea of the defendant not involved a partial admission of the claim, and had expressed a total denial. For instance, Zeyd sues Omar, the son of Khalid, by his wife Hinda, for half the property left by Khalid, calling himself the half-brother of Omar, and son of Khalid by another wife (Zeinub). Omar, in answer, pleads that Zeinub, the mother of Zeyd, was always the wife of Bukr, and that she could not therefore be the wife of Khalid, nor could Zeyd be the son of Khalid. In this instance it is permitted to the defendant, Omar, to prove the marriage between Zeinub and Bukr. If he prove it, the claim falls to the ground; and if he do not prove it, still it will be incumbent on Zeyd to prove the marriage of his mother with Khalid, or the fact of his being the offspring of Khalid, in some other mode, before he can be entitled to a moiety of the inheritance. In the suit in question, the defendant denies the fact of the plaintiff's mother having been married to Bazeed Khan, and states her to have been the slave of the wife of Bazeed Khan, and concubine of that person. This answer therefore involves a total denial of the plaintiff's claim. The defendant, if he pleases, is at liberty to bring evidence to prove that the plaintiff's mother was the slave of the wife of Bazeed Khan, in the legal acceptation of the term, and should he prove it, her claim will fall to the ground; but should he fail to prove it, or decline doing so altogether, still it is incumbent on the plaintiff to prove her mother's marriage, or to establish, by some other mode, the fact of her being the offspring of Bazeed Khan, without which she is not entitled to the inheritance. The witness who states that he conjectures the mother of the plaintiff was married, admits that the ceremony did not take place in his presence, and that he never heard Bazeed Khan acknowledge the marriage; and he states further, that his conjecture is founded on the fact of fornication having been strictly prohibited in the time of Hafiz Ruhmut (the Rohilla ruler); whence he concludes that the intercourse between Bazeed Khan and the plaintiff's mother must have been matrimonial. Such conjectural evidence however is not admissible in law; for it is necessary that a witness should possess firm belief. The defendant has admitted that the plaintiff's mother was the *hurum* of Bazeed, yet, taken along with the context, the use of this expression cannot afford any argument in favour of the marriage. Although the term "*hurum*" does, according to some authorities, signify a married woman, yet, according to the popular acceptation, it is usually meant to denote slave girls and the like, who are taken under the protection of a man, and kept secluded, whether married or not. The term therefore, as used by the defendant, (he having distinctly asserted that the plaintiff's mother was unmarried,) must be held to mean a concubine merely. Such expression, therefore, in conjunction with the conjectural evidence of one wit-

1821.

Hukeem
Wahid Ali,
v. Khan
Beebee.

1820. ness, cannot raise any presumption in favour of the marriage of the plaintiff's mother with Bazeed Khan (a).

Hukeem
Wahid Ali,
v. Khan
Beebee.

The opinion of the officiating Kazees Ool Koozat, differed in a material degree from that of his colleagues, but it was not adopted; this being considered the more correct exposition of the law. The Third Judge (S. T. Goad) after perusing the above legal opinion and the other documents connected with the appeal, and entirely concurring with the Second Judge as to the merits of the case, a final decision was passed accordingly, reversing the decree of the Court below, and making the costs of suit payable by the respondent.

1821.

ROODER CHUNDER CHOWDHRY, Appellant,

versus

August 8th.

SUMBHOO CHUNDER CHOWDHRY, Respondent.

Property which had devolved on a widow at the death of her husband, goes at her death to her husband's younger brother, to the exclusion of his elder brother's son, agreeably to the Hindoo law of inheritance.

THE respondent brought this action against the appellant on the 8th of February 1819, in the Dacca Court of Appeal, to recover possession of a 13 gunda, 1 cownie, 1 krant share of a zemindaree situated in pergunnas Mymensingh and Zuffer Shahee, the triennial assessment of which was stated to be 15,210 rupees.

(a) This has been cited in the work termed "*Principles and Precedents of Moohummudan Law*, page 371, and the following note extracted therefrom will show the nature of the opinion of the officiating Kazees Ool Koozat, which was at variance with that of the other law officers. The above opinion was delivered by Moohummud Rashid and Hamid Oollah, the two established law officers attached to the Court, and judgment was given accordingly; but Moulavee Ainaun Oollah (who was at that time officiating for Surajooddeen, as Kazees Ool Koozat) delivered an opinion, declaring that the marriage was established, and that the plaintiff was therefore entitled to the inheritance. The opinion is ingenious and erudite; but did not exactly bear upon the case. It does not therefore seem necessary to furnish an accurate translation of it. He admitted that to establish marriage, it was necessary that evidence should be given in favour of it, or that there should be the husband's declaration; and he also admitted that the fact could not be established by the mere conjectural evidence of one witness; but he contended that the defendant, by admitting that the plaintiff's mother was the *Aurum* of Bazeed Khan, had made out her case. He quoted several works of great authority to prove that the term "*Aurum*" signifies a married woman, living in a state of seclusion. But in this case (it should be observed) the object was not to ascertain the true intent and meaning of the term; but the meaning attached to it by the defendant. He further contended that continual cohabitation is *prima facie* evidence of marriage; and that it is criminal, without proof, to suspect a Moosulmaun of so improbable an act as that of fornication; and that where there are two suppositions, it is right to select that which is the more probable. But the question (it should also be observed) in this case, was not, what degree of evidence is required to establish the fact of marriage; but what degree of evidence it was necessary for the plaintiff to bring forward in order to establish her claim; it being a general rule of Moohummudan law, that, on the defendant's denial, the plaintiff must adduce proof of the claim. Had the suit been brought forward to set aside an alleged marriage, the presumption must undoubtedly have been in favour of marriage; and it would have been upheld by hearsay and circumstantial evidence, such as cohabitation, common repute, and the like.

1821.

Rooder
Chunder
Chowdhry,
r. Sumbhoo
Chunder
Chowdhry.

The following was the state of the case: Lukhinarain, the proprietor of a four ana share of the property in dispute, died leaving three sons, Sham Chunder, Govind Chunder and Rooder Chunder; Govind Chunder, the second brother, died in the Bengal year 1190, childless, but leaving his widow. His two brothers took possession of his share of the estate, alleging that he had made a gift of it to them, but his widow Radhamunee sued them, and ultimately obtained a decree in her favour in the Court of Sudder Dewanny Adawlut (a); and she got possession of the portion enjoyed by her husband during his life time. Sham Chunder, the eldest brother, and father of the plaintiff, Sumbhoo Chunder, died in 1819, and Radhamunee, the widow of Govind Chunder, died in 1821. The claim of the plaintiff was for half the property left by Radhamunee, to which she had succeeded on the death of her husband by a decree of the Court of Sudder Dewanny Adawlut. It was alleged on behalf of the plaintiff, that his father and the defendant had entered into an agreement, to the effect that, on the death of Radhamunee, they should equally divide between them the property held by her, and that in the event of either dying before Radhamunee, the representative of the deceased brother should share equally with the survivor. It was urged in reply, that no such agreement as that alleged by the plaintiff had ever been executed, and that according to the Hindoo law, the plaintiff had no legal claim to any portion of the property left by Radhamunee, his father having died during her life time. The Third Judge of the Dacca Court, without reference to the authenticity or otherwise of the agreement alleged to have been entered into by the parties, considering the decision of the case to turn chiefly on a point of Hindoo law, put the following question to the pundit: On the death of a Hindoo widow, who had a life interest in her husband's estate, the claimants to such estate are her husband's brother, and the son of a deceased brother of her husband. Under these circumstances, which of these two claimants is entitled to inherit the property? The pundit of the Dacca Court replied, that they were entitled to participate equally; but the Judges having some doubt as to the accuracy of this exposition of the law, the case was referred to the Court of Sudder Dewanny Adawlut, with a request that the opinion might be reported on by the law officers of this Court. The law officers, Sobha Rai Shastree and Ramtunoo Serma, having accordingly perused the question and reply, verified the exposition delivered in the Court below, stating that the plaintiff was, in this case, entitled to his share; as a son whose father is dead is entitled to share the inheritance with his uncles, agreeably to the following text of *Catyayuna*, cited in the *Daya Bhaga*, "should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather."

On the receipt of the above verification of the opinion of the pundit of his own Court, and considering it established that an agreement was entered into as stated by the plaintiff, the Third Judge of the Dacca Court of Appeal gave judgment in favour of the plaintiff, directing the Collector to separate the share obtained

(a) For an account of this case, see printed Reports, No. 41, of causes adjudged previously to the year 1805.

1821. by him from the rest of the estate, conformably to the 5th section of regulation 19, 1814.

Rooder
Chunder
Chowdhry,
v. Sumbhoo
Chunder
Chowdhry.

Rooder Chunder Chowdhry being dissatisfied with this decision, appealed to the Court of Sudder Dewanny Adawlut, and the cause came to a hearing on the 16th, 17th, 18th and 19th of July 1821, before the Officiating Judge (W. Dorin), who recorded his opinion to the following effect: This claim appears to have been instituted for the recovery of half the estate which was held by Govind Chunder Chowdhry, and which, on his death devolved on his widow Radhamunee. A decree has been passed by the Court below in favour of the respondent, partly on the ground of an alleged special agreement, and partly on the general law of inheritance; but with reference to the question of law, it appears necessary to investigate the matter more fully. From the English version of the *Daya Bhaga*, of the *Daya Cruma Sungraha*, and of the *Vivada Bhungarnubh*, compiled by Jugunnatha Turkapunchanuna, and translated by Mr. Colebrooke, as well as from the *vyavasthas* delivered by the pundits of this Court, in the case of Rooder Chunder Singh, petitioner, in the case of Srinarain Rai and others, *versus* Bhya Jha, and from the opinion delivered by the pundits in this case, agreeably to the requisition of the Dacca Court of Appeal, it appears to be an established maxim of law, that in the case of landed property devolving on a woman by the death of her husband, the right of her husband's heir begins to accrue from the date of the death of the widow, not from the date of the death of her husband. Consequently, of the husband's heirs, they only can be entitled to the inheritance who are living at the time of the widow's death. The right of him who dies during her life time is entirely forfeited, and cannot devolve on his son. This doctrine has been established by former legal expositions. Although there is some difference between the Hindoo law as current in Purneah, and the rest of Bengal, yet there is no difference of opinion on this point, all agreeing that a widow succeeds in default of a son, grandson, and great-grandson; and, although the widow is restricted from transferring the property, yet she is clearly an heir, and has an indefeasible right of succession. With regard to the opinion furnished by the pundits of this Court at the requisition of the Dacca Court of Appeal, it is certain either that the question was not stated correctly, or that the purport of it was not clearly understood by the law officers. They must have concluded that the question was put presuming the right of Govind Chunder's brothers to have accrued immediately on his death. Had this been the case there could not have existed a doubt on the subject; but the widow had the right during her life time, agreeably to the decree of this Court; without detriment however to the brothers reversionary interest. The authority quoted is not applicable to the case in question, and the law, as hitherto expounded, is, that on the death of a childless widow, on whom her husband's property had devolved, her husband's brother is heir, to the exclusion of her husband's brother's son. It is fit, however, that the pundits should have an opportunity of explaining their meaning, and that the same question should again be proposed to them in the following terms: There are three brothers, joint proprietors of an estate, of which they have equal shares. The second brother, by name

Govind Chunder, dies childless, leaving a widow named Radhamunee, who by the law of inheritance succeeds to his portion of the estate, and enjoys it during her life time. Previously to her death the eldest brother dies leaving a son. Under these circumstances, on whom does the property devolve on the death of Radhamunee conformably to the law of inheritance? Does it go to the younger brother of her husband who was living at the time of her death, or to the son of his deceased elder brother? in other words, the second brother dying childless, and his widow taking his share of the estate by inheritance, and holding it during her life time, subject to the reversionary interest of her husband's heirs, from what date does the right of such heirs begin to accrue, from the death of the widow, or from the death of her husband? The pundits were further desired, if they adhered to their former opinion, to reconcile it with the doctrine they had pronounced on former and similar occasions: and they were directed, should they entertain the slightest doubt as to the intent and meaning of the question now propounded, to apply to the Court for a solution of such doubt. On the 11th of August the cause came on again before the Third and Officiating Judges (S. T. Goad and W. Dorin), the pundits having delivered an amended reply to the following effect: Under the circumstances now stated, the widow's husband's younger brother will succeed to the property which had devolved on her, and the son of his elder brother will not be entitled to any portion of it; because the property of a man which had devolved on his widow will, if at her death he had neither daughter nor daughter's son, nor parents, go to his brother, to the exclusion of his brother's son; the right of a brother's son being subordinate to that of a brother. The right of the husband's heirs does not accrue on his death, but on the death of his widow; because the following is the prescribed order of succession to the estate of a person leaving no male issue: First the widow succeeds, then the daughter, next the daughter's son, then the father, next the mother, then the brother, then the brother's son, and so forth. The rights of these individuals accrue consecutively, and therefore as long as one holding the prior right exists, the right of the heir whose claim is posterior cannot come into operation. This is the case in the present instance with the widow, the husband's brother, and his brother's son. The former reply was given under a supposition that the widow's tenure in this case was of a peculiar nature, and qualified or limited by some special circumstances. Now, as it has been explained that the widow succeeded absolutely and by the ordinary law of inheritance to her husband's property, a suitable reply has been given conformably to the doctrine contained in the *Daya Bhaga*, the *Daya Crama Sungraha*, the *Vivada Bhungarnuba*, and other authorities current in Bengal.—Authorities: *Yajnyawalkya*, cited in the *Daya Bhaga* and other law tracts: a wife, daughters, both parents, brothers, their sons, kinsmen sprung from the same original stock, distant kindred, a pupil and a fellow student in theology. On failure of the first of these, the next in order shares the estate of him who has gone to heaven leaving no male issue: this law extends to all classes. *Jimuta Vahana*, in the *Daya Bhaga*, treating of the succession of brothers, proceeds to state, if there be none, the property goes to the brother's son.

1821.

Rooder
Chunder
Chowdhry,
v. Sumbhoo
Chunder
Chowdhry.

1820.

Rooder
Chunder
Chowdhry,
v. Subbhoj
Chunder
Chowdhry.

Vishnu, cited in the *Daya Bhaga* and other works: The wealth of him who leaves no male issue goes to his wife; on failure of her to his daughter; if she be dead to the son of a daughter; if there be no such grandson, to the father; in his default to the mother; on failure of her to the brother; if he be dead to the brother's sons; in default of this to the remoter kinsmen, &c. *Vridha Menu*, cited in the *Daya Bhaga*, &c. a widow, who has no male issue, who keeps the bed of her lord inviolate, and who strictly performs the duties of widowhood, shall alone offer the cake at his obsequies, and succeed to his whole share.*

Vrihaspati, cited in the *Daya Bhaga*, &c. In scripture, in law, in sacred ordinances, in popular usage, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives; how should another take the property while half the body of the owner lives? Although distant kinsmen, although his father and mother, although uterine brothers be living, the wife of him who dies leaving no male issue shall succeed to his share. Since she was previously espoused in due form, she must support the consecrated fire; and after the death of her husband, the widow, faithful to her lord, shall take his wealth; this is a primeval law. Taking his effects moveable and immoveable, the precious and base metals, the grain, liquids and clothes, let her cause the several *sraddhas* to be offered in each month, in the sixth and at the close of the year: After citing the text of *Vrihaspati* in the *Daya Bhaga*, *Jimuta Vahana* proceeds to state, that while the widow survives, the succession of parents, brethren, and the other heirs, is extremely remote.

After a perusal of the above exposition, and of the other documents connected with the case, the Third and Officiating Judges recorded their opinion that the younger brother of the deceased Govind Chunder, who was alive at the time of the widow's death, was alone entitled to the property which had devolved on her. They were further of opinion, that the authenticity of the alleged agreement had by no means been proved, and consequently, that the claim of the respondent, whether founded on that document or on the law of inheritance, must fall to the ground. The decree therefore of the Court below was reversed, and judgment was given in favour of the appellant, awarding him possession of the property in dispute with mesne profits. Costs of both Courts were made payable by the respondent (a).

(a) Were it necessary to adduce any farther proof of the inaccuracy of the opinion delivered in the first instance, the following statement of facts is perhaps calculated to place the matter beyond all doubt, and to account for such opinion in a manner more satisfactory than the Pundit's explanation. A complaint having been preferred to the Court of Sudder Dewanny Adawlut against Sobha Shastree, the head Pundit of the Court, for extortion, and it having been ascertained that there were suits for debt pending against him in the Supreme Court, the Register was desired to collect all the information he could, relative to those suits, and he accordingly, on the 12th of December 1823, submitted a report to the Court, of which the following is an extract: "The Register, in conformity with the instructions of the Court, under date the 12th instant, submits the following memorandum of circumstances relative to Sobha Shastree, one of the Hindoo law officers attached to the Sudder Dewanny Adawlut: In the month of April 1822, the Shastree having absented himself from his duties for several

ZUMEEROODEEN and MUSSUMMAUT ZEINUB BANOQ,

1821.

Appellants,
versus

Sept. 1914.

RAMMOHUN MULLIK, Respondent.

THIS claim was instituted in the Calcutta Court of Appeal on the 24th of January 1817, against the appellant and her husband Zumeeroodeen, to recover possession of certain lands in Khiderpore, with the houses erected thereon, the value of which was estimated at 65,000 rupees. The grounds of the claim were thus stated: "On the 25th of October 1811, Zumeeroodeen borrowed from me the sum of 52,000 rupees, and mortgaged to me the lands I now claim in security for the debt. The term allowed for the mortgage to run was one year, and a judgment bond was executed by Zumeeroodeen to that effect. As my money was not repaid on the expiration of the term specified in the judgment bond, I applied to the Supreme Court, who ordered the Sheriff to sequester the mortgaged property, and to dispose of it by public auction. The Sheriff accordingly put his seal on the premises. Zumeeroodeen then sued me in the Supreme Court to procure the redemption of his mortgage, on the plea that the money had been repaid; but his

The Sudder Dewanny Adawlut will uphold a decree of the Supreme Court, in favour of a mortgagee founded on a bond to confess judgment, although the foreclosure of the mortgage may be contrary to regulation

days, an enquiry was instituted as to what had become of him; when it appeared that he had been arrested and thrown into jail. On further enquiry, it was ascertained that he was confined for debt at the suit of a person named Ramnidhee Sain, Mokhtarkar, on the part of Sumbhoo Chunder Chowdry. This Ramnidhee Sain was called, and by order of the Court examined by me as to the nature of his claim against the Pundit. He deposed, that the Pundit owed him 12,000 rupees principal, and 2,732 rupees interest, on a debt on bond which was executed on the 24th of *Phalgun* 1226, B.S. This deposition was taken down on the 8th of May 1822, and the deponent refusing to swear to the truth of its contents, was subsequently dismissed, for contempt, by order of the Court, from his situation as a Mokhtar in the Sudder Dewanny Adawlut. Three persons whom he named as witnesses to the transaction of the loan were summoned through the Nazir; but could not be found. The Pundit subsequently to his liberation from jail, on the 10th of May, was called on for a reply to the allegation of Ramnidhee Sain, when he totally denied the debt, nor would he admit that he ever had any pecuniary concern whatever with that individual. The Court having no means at the time of satisfying themselves as to the fact whether the debt was really due, resolved to wait the issue of the suit; and I was directed in the mean time to obtain any information on the subject I might be able, from some person connected with the Supreme Court. I accordingly made a private application to the Prothonotary, who furnished me with the following memorandum:

Ramnidhee Sain, versus Soobha Rai Surmono.

Sum sworn to 14,732. Bailable 14,832.

Wordsworth, Plaintiff's Attorney.

The defendant was committed to jail on the 1st day of April 1822, under the above *capias*, and released on the 8th of May 1822, on filing a certificate of Prothonotary of bail piece, and order of Sir Francis Macnaghten thereon. To be tried next term.

Original debt 12,000 rupees; interest from May 1820, at 12 per cent.—I heard nothing more of this suit until last week, when I applied to the Prothonotary to acquaint me with the result, if it had been decided, and he sent me the following memorandum:

Ramnidhee Sain, versus Soobha Rai Surmono.

Judgment for plaintiff on 12,000 sicca rupees, on all counts of plaint except the first.—Prothonotary's Office, 10th December 1823.

The following facts led the Court at the time to attach no small decree of suspicion to the Pundit's conduct on this occasion. Ramnidhee Sain was the Mokhtar or agent of a person named Sumbhoo Chunder Chowdry, who instituted

1821.

Zumeeroodeen and
Musannumant Zeinub
Banoo,
v. Rammo-
mun Mullik.

claim was dismissed as being wholly groundless. The Sheriff repeatedly put up the property to sale, but no purchasers would come forward, under the apprehension that the Sheriff was not competent to confer possession. At length as Zumeeroodeen permitted the estate to fall in arrears, the Collector advertised it for sale, in consequence of which I came forward and paid up the balance of revenue, which I have continued to do up to the present day. As the Judges of the Supreme Court had passed a decree in my favour for the mortgaged lands, as specified in the judgment bond, I applied to the Judge of the Suburbs of Calcutta to be put in possession; but the defendant, Zeinub Banoo, having represented that the property was her's, and had been settled upon her by her husband Zumeeroodeen in lieu of dower, a reference was made to the Sudder Dewanny Adawlut, the Judges of which Court, after consulting with the Advocate General (a), determined that I should be left to a regular suit to establish my right of possession." The plaintiff concluded by stating that he had made Zeinub Banoo a defendant with a view to set at rest for ever any claim

a suit against a person names Rooder Chunder Chowdry in the Dacca Court of Appeal, to recover a certain portion of a zemindaree, the triennial sudder jumma of which was estimated at 15,210 rupees. The decision of the case turned chiefly on a point of Hindoo law as to whether, on the decease of a widow on whom a lauded estate had devolved by the death of her husband, such estate should go to the husband's brother only, or to his nephew also. The Dacca Court having obtained a *ryurastha* from their Pundit, who gave a reply in favour of the nephew, thought it a case of sufficient importance to refer for the opinion of the law officers of the Sudder. They accordingly did refer the point with their proceeding, dated the 10th of February 1820, corresponding with the 29th of *Magh* 1226, B. S., and the reply of the Pundits was returned with the Registrar's letter, dated the 24th of March 1820, corresponding with the 13th of *Chait* 1226. Their opinion confirmed that of the Pundit of the Provincial Court, and was in favour of the claim of Sumbhoos Chunder Chowdry, for whom Ramnidhee was Mukhtar, in whose favour a decree passed accordingly. On appeal to this Court by the defendant, Rooder Chunder Chowdry, the above opinion of the Pundits of this Court was filed in support of the respondent's claim; but the Judge who tried the appeal observed that the said opinion was at variance with the received doctrine as translated from books of Hindoo law, and moreover contrary to opinions formerly delivered by the Pundits of this Court on similar occasions. He went on to record his opinion, that the Pundits could not have understood the question, or that having understood it, they had furnished an erroneous reply; and directed that the same question should again be put to them in a manner impossible for them to misunderstand. This was done accordingly on the 28th of July 1821, and they delivered an opinion diametrically opposite to their former one, stating that Rooder Chunder was the sole legal successor, and a decree was pronounced in the appellant's favour accordingly by Messrs. Dorin and Goad. It is remarkable that the bond of Ramnidhee Sain bears date *Phalgun* 1226, that is, the month intervening between *Magh*, when the Provincial Court made their reference, and *Chait*, when the reply was returned by this Court, giving an exposition of the law in favour of the employer of Ramnidhee Sain. The Pundit totally denied that any debt was due, and by the ultimate judgment it was proved. The Court will draw their own inference from the above statement."

The Pundit subsequently absconded, and has not since been heard of.

(a) The opinion of the Advocate General on the occasion in question was delivered in the following terms :—" I am of opinion that the proper remedy as to obtaining possession of the estate mortgaged by Zumeeroodeen Moonshee, is by a suit in the Mofussil Court by the mortgagee (*Quere* against the mortgagor?) who cannot have any defence, the equity of redemption having been foreclosed by the Supreme Court. Zumeeroodeen not being subject to the jurisdiction of the Supreme Court an ejectment cannot be brought against him for the possession in that Court, which obliges the mortgagee to resort to the Mofussil Court."

which she might urge, although, in point of fact, she had nothing to do with the transaction between the parties, and never possessed the slightest right or title to the lands claimed.

1821.

Zumeeroodeen and
Mussum-
mant Zei-
nub Baoo,
v. Ramino-
huz Mullik.

The defendant averred in reply that she was married to Zumeeroodeen in the Bengal year 1200, on which occasion he settled upon her, by deed of dower, the sum of two lacks and nine hundred rupees, and that, subsequently, he conferred upon her and gave her possession of the whole of the lands claimed by the plaintiff, besides other property in commutation of the sum of seventy thousand, six hundred and one rupees, or that portion of her dower which was demandable promptly. That her husband consequently had no power to make the mortgage, or to execute a judgment bond in favour of the defendant for those lands; that the plaintiff had in a former application to the Supreme Court, stated that he had realized a portion of the debt due to him, whereas he now alleges that he had received no part either of the principal or interest, and that, at all events, the claim was not maintainable, as being in opposition to sections 7 and 8, regulation 17, 1806. The other defendant (Zumeeroodeen) suffered judgment to go by default. On the 11th of December 1817, the First Judge of the Provincial Court passed the following decree: The plaintiff founds his claim on a judgment bond executed by Zumeeroodeen, on the 25th of October 1811, on which a decree was obtained in the Supreme Court on the 19th of June 1815, for the sequestration and sale of the lands in dispute. The defendant having, in the first instance, alleged that the mortgaged lands were her property and had been conveyed to her by her husband Zumeeroodeen, in lieu of a portion of her claim of dower, proceeds to state, that the action is not maintainable consistently with the provisions contained in sections 7 and 8, regulation 17, 1806. But this plea is perfectly futile, because Zumeeroodeen voluntarily subjected himself to the jurisdiction of the Supreme Court; and executed a judgment bond, conformably to which the property was decreed to the plaintiff by the Supreme Court. That point therefore, consistently with the provisions of section 16, regulation 3, 1793, cannot be retried. It only remains to investigate the alleged previous conveyance to the defendant under her claim of dower. But this plea appears to be fraudulent on many grounds. Only one witness has been brought forward to authenticate the deed under which it is stated to have been made, and that witness is a relation and dependant of the defendant. The deed in question was not registered nor authenticated by any public officer. From the date of its alleged execution, up to the institution of the present suit, no mention was ever made of the existence of such an instrument. The instrument itself bears internal marks of having been recently fabricated, all which, and other reasons, tend to prove that it is not genuine or authentic, and has been merely prepared for the occasion to meet the demand of the plaintiff. The First Judge therefore decreed that the plaintiff was entitled to possession, according to the judgment of the Supreme Court, of the lands in dispute, with all the buildings erected thereon. The defendants being dissatisfied with the above decision appealed therefrom to the Court of Sudder Dewanny Adawlut, and the case came to a hearing on the

1821. 8th of May 1820, before the Chief and Officiating Judges (W. Leycester and W. Dorin). As the case was from its magnitude appealable to the King in Council, the Court deemed it advisable, previously to passing a final decision, to give the appellants an opportunity of bringing forward all the evidence they might be able to adduce, with a view to cut off all reasonable pretext for further litigation, but the appellants having failed to produce any additional testimony in their favour, up to the 19th of September 1821, and there appearing to be no reason whatever for interfering with the judgment of the Court below, the decree of that Court was affirmed accordingly with costs, on the date last mentioned.

1821. POKHNARAIN, MOHUN LAL, and SOHUN LAL, Appellants,
versus
 Nov. 5th. MUSSUMMAUT SEESPHOOL (Widow of RAMDYAUL),
 Respondent.

The decrees of a Court below in favour of a Hindoo widow for possession of her husband's landed property amended on the ground of their not having specified the nature of interest and the mode in which the property should be disposed of after her death.

THIS was a claim originally preferred in the Zillah Court of Tirhoot on the 25th of February 1812, by the respondent to recover possession of half the talooks of Bhugwanpore, Mominabad, Hurnarainpore, &c. the annual produce of which was stated at 1,877 rupees.

The plaint set forth that the whole of the above talooks belonged to the plaintiff's husband Ramdyaul and his brother Gunaish Dutt, which last mentioned individual died in *Cheit* 1203, F. S., and the plaintiff's husband performed his funeral obsequies and succeeded to all his property, real and personal; that the widow of Gunaish Dutt prevailed on the plaintiff's husband, who was a simple man, to execute a deed in favour of Pokhnarain, who was her daughter's son, constituting the said Pokhnarain joint proprietor of the estate, but previously to Ramdyaul's death, which occurred in the year 1220 F. S., this deed was cancelled by the express consent of the widow of Gunaish Dutt, from the circumstance of Pokhnarain's inability to make good his portion of the public revenue; that the death of Ramdyaul's widow occurred in 1215, on which event the plaintiff's husband became proprietor of the entire estate, but that Pokhnarain and his brothers, who as daughter's sons have no legal right of succession, had since his decease procured the registry of their names as proprietors. The plaint concluded by stating, that it was the intention of the plaintiff to sue for the proprietary right to the whole of the lands, but that, from a deficiency of funds, she was unable at present to sue for more than a moiety. It was alleged in reply, that Gunaish Dutt was the sole acquirer and sole proprietor of the lands in dispute; that he transferred them to his grandson Pokhnarain, for whose benefit he held them during such grandson's minority, and that although after his death, the plaintiff's husband was admitted by Pokhnarain to a participation during his life time in the lands, it was under the express condition and written acknowledgment that he had no claim whatever to proprie-

tary right. A decree was passed by the Register of Zillah Tirhoot in favour of the plaintiff, which was affirmed in appeal by the Patna Provincial Court, awarding to her the proprietary right, in general terms, of the moiety claimed. A petition for a special appeal was presented to the Court of Sudder Dewanny Adawlut, and being admitted, the Court deemed it necessary to put the following question to their Hindoo law officers: 'Two uterine brothers, by name Gunaish Dutt and Ramdyaul Singh, inhabitants of Zillah Tirhoot, were joint proprietors of an estate in that district, holding equal shares. Gunaish Dutt dying, left as his heirs a widow, a daughter, and three sons of that daughter; afterwards the widow died, and the survivors were her daughter and the three sons of that daughter. Subsequently Ramdyaul, the second brother, died childless, leaving a widow. Under these circumstances does the property of Ramdyaul devolve on his widow, or on the daughter and grandsons of his brother? The pundits replied, that whether the estate was joint or separate, the share left by Ramdyaul would not go to the daughter and grandsons of Gunaish Dutt; the daughter and grandsons in the female line of a brother not being recognized as heirs in any of the books current in Mithila, but that the question of the widow's right of succession depended upon the fact of her husband's property having been separate and defined, or otherwise, and whether or not there existed other claims of consanguinity superior to her own. This opinion not proving quite satisfactory, the pundits were again referred to and desired to be more explicit, and to state, should the property of Ramdyaul devolve on his widow Mussumaut Seesphool, whether she possessed the power of alienating it by gift, sale, or otherwise, or whether she had only a life interest in it? The pundits in reply to this reference stated, that their reasons for desiring to know whether or not there existed other claims of consanguinity superior to that of the widow, was, that according to the law, as current in the district of Tirhoot, if the husband's share of the estate was not separate and defined from that of his partner, his widow could not succeed to his property, which would in that case go to the nephew or other relation of her husband; but that as it appeared there was no such relation, the widow was entitled to the entire property left by her husband, to be enjoyed by her during her life time, but not to be alienated except for the special purpose of securing spiritual benefit to her deceased husband; and that after her death, in the event of there being no heir of her husband in existence from the daughter down to the spiritual teacher, the property should devolve on the ruling power. On the 13th of June 1821, the whole of the proceedings of the case having been gone through before the Second Judge (C. Smith), before whom the case was first heard in appeal, he decreed as follows: It appears from all the evidence adduced, that Gunaish Dutt and Ramdyaul were two brothers in joint possession of an undivided landed estate situated in the district of Tirhoot; that on the death of the former individual, the latter succeeded to his portion in right of inheritance, and continued in exclusive enjoyment of the entire property until his death, when both shares devolved of right on his widow Mussumaut Seesphool. This indeed is the substance of her plaint, although

1821.

Pokhnarain
Mohun Lal
and Sohun
Lal, v. Mus-
sumaut
Seesphool.

1821. for the present she has advanced her claim to one moiety only, and has stated it to be her intention to lay claim to the other moiety at a future period. It appears from the second law opinion delivered by the pundits, that Mussummaut Seesphool has a right to the possession of the estate left by her husband during her life time, that she may make such disbursements as are necessary for the spiritual welfare of her deceased husband, that she is not at liberty to make any other description of alienation, and that after her death, in the event of there not being in existence any heir of her husband from his daughter, down to his spiritual teacher, the property which had so devolved on the widow should escheat to the ruling power. But, in the decrees of the Courts below, there is no mention made of the widow's inability to alienate, nor of the mode in which the property should be disposed of after her death. It seems therefore necessary to amend the decree of the Provincial Court by wording the decision thus :—Mussummaut Seesphool shall have a life interest in one moiety of the landed property left by her deceased husband, which property shall be sequestered to the use of Government, in the event of there not being at the time of her death any surviving heir of her husband, from the daughter down to the spiritual preceptor. The decree should further provide, that Mussummaut Seesphool is at liberty to sue for the remaining moiety of the estate, and that the costs in all three Courts should be paid by the appellants.

The case having been next taken up by the Third Judge (S. T. Goad), he expressed his concurrence in the opinion recorded by the Second Judge, with the exception of that part of it which expressly provided that Mussummaut Seesphool was at liberty to sue for the remaining moiety of the estate. He did not deem it necessary to provide specifically for her preferring a claim which she was at liberty to do under the general regulations, without such provision : especially, as it appeared that the names of the appellants had been registered with the consent of the respondent's husband, as proprietors of one moiety of the estate claimed. The Fourth Judge (J. Shakespear) coinciding in this view of the case, a final decree was on the 5th of November 1821, passed according to their concurrent opinion, which differed only in one particular, as above specified, from that of the Second Judge.

MR. JAMES MORRIS, Appellant,

1821.

versus

MR. JOHN COLLIS, Respondent.

Nov. 26th.

THIS suit was originally instituted by Mr. John Collis, *versus* Mr. James Morris, in the Benares Court of Appeal, on the 13th of December 1814. The following was the substance of the claim : The plaintiff and defendant had long been on terms of intimate acquaintance with each other, and at length determined to set up a shop in partnership. It was agreed that the partnership should last for two years, commencing with the 1st of June 1812, and it was also conditioned that should any difference of opinion arise between the partners, it was to be settled by two arbitrators, one of whom was to be appointed by each partner, and in the event of the arbitrators differing, an umpire was to be appointed, by whose decision the parties should abide. It was also agreed that on the expiration of the term of the partnership the affairs of the concern should be adjusted, and each partner should take his share of the profit and loss of the debts and outstanding balances. On the 25th of May 1814, when the period agreed upon for the continuance of the partnership had nearly expired, an advertisement was published, giving notice that the partnership between Messrs. James Morris and John Collis would be dissolved on the 31st of May next ensuing, requiring all persons indebted to the firm to pay in their respective debts before the 1st of July following, and all creditors to prefer their respective claims before the same period. On the 29th of May of the same year the defendant wrote a letter to the plaintiff, offering to take off his hands all the articles in the shop at prime cost, and stating that he intended to continue the business in his own name. The plaintiff at the time answered that he had no intention of disposing of his property at that rate. A bargain however was ultimately made between them, the defendant agreeing to pay an advance of ten *per cent* on the selling price of the goods, and to pay the amount in three instalments at intervals of three, nine and eighteen months. The first instalment was to be paid in three months after the 1st of June, without interest, or if not paid at that period, it was to bear interest at ten *per cent per annum*, the interest demandable monthly. The defendant wrote a letter agreeing to the above terms. The goods were computed to be worth 35,370 rupees, half of which, or 17,685 rupees belonged to the plaintiff. Besides this, there were outstanding balances to the amount of about 25,000 rupees, which it was agreed the defendant should collect, and from that source discharge any demands that might preferred against the firm, leaving the surplus, after adjustment, to be divided between the parties to this agreement. Notwithstanding these facts, the defendant would not make payment, neither would he execute any bond acknowledging the instalments formerly stipulated to be due, nor would he agree to refer their differences to arbitration. When the plaintiff wrote to the defendant on the 18th of August 1814, to send for his inspection the bills to the amount of 25,000 rupees, due from the several

In a case of disputed partnership accounts, between two European shopkeepers, the Court referred the proceedings to a gentleman skilled in mercantile affairs, and passed a decree on the basis of his report.

1821. debtors to the firm, with a view to satisfy himself as to the state of the pecuniary affairs of the concern, the defendant had the assurance to write in answer to the plaintiff, requiring him to transmit copies of all the ledgers and account books belonging to the establishment, although he himself had retained the sole custody of those books ever since the 31st of May. Five months had elapsed since the first instalment became due, which amounted to 5,895 rupees, and which was the amount of the present claim. The defendant admitted having purchased the plaintiff's share of the stock in trade, but alleged that he did so in ignorance of the real facts of the case, which the plaintiff concealed from him by withholding the account books; but that he had since ascertained the state of the firm, and found that a large balance was due to himself. He denied having promised to pay by instalments, and stated generally that he had invested large sums of money in the concern, which had been made away with by the plaintiff.

Mr. James
Morris, v.
Mr. John
Collis.

After an attentive perusal of the evidence in this case, the Provincial Court declared their opinion that the allegations of the plaintiff were abundantly established, and that the defendant had wholly failed to prove his right to make any counter claim against the plaintiff on account of any matter connected with the concern of their partnership. It was decreed accordingly, that the defendant do pay to the plaintiff the sum of 5,895 rupees, being the amount of the first instalment, or one third of the amount stipulated to be paid by the defendant for the plaintiff's share of the stock in trade, and likewise defray all the costs of suit.

On appeal to the Court of Sudder Dewanny Adawlut, the cause came first to a hearing before the Chief (Sir J. E. Colebrooke) and the Third Judge (S. T. Goad) on the 24th of July 1820. It appearing that there were a great variety of accounts unsettled between the parties, and, that according to the articles of partnership entered into by them, they were bound, upon the termination of their partnership, or upon the occurrence of disputes, to settle them by arbitration, the decree in this cause, and in another between the same parties founded on the same grounds were annulled, and the parties were called upon each to name arbitrators, to whom the whole of their accounts were to be referred for adjustment. On the 16th of December 1820, Mr. John Collis, the respondent, attended in person and delivered an arbitration bond executed by him, nominating John Robert Coles and James Duncan Conyers to be arbitrators on behalf of the parties, and containing a condition that such award as should be passed by the arbitrators named, and agreed to by the parties respectively, should become a rule of the Supreme Court. On the date last above mentioned, a copy of this bond of arbitration, was forwarded to the Benares Provincial Court, for the purpose of being executed by the appellant, Mr. James Morris. From the return of the Benares Provincial Court, under date the 19th of January 1821, it appeared that the appellant refused to execute the arbitration bond, on the ground stated by him in a letter under the same date. Mr. John Collis, the respondent, having verbally declined executing any other kind of arbitration bond, it appeared

impracticable to bring the concerns of the parties to a settlement by means of arbitration. On the 23d of April 1821, Mr. John Collis, the respondent, attended in person and delivered sundry books, accounts and papers, and it being found impracticable for the Court, from want of leisure, to enter into that minute examination of the voluminous accounts of the parties which was necessary, it was resolved and ordered on the date last mentioned, that the whole of the books, accounts, documents and papers, delivered in by the parties, as well to the Provincial Court as to this Court, should be referred to a person skilled in mercantile accounts; and Mr. John Abbott, a gentleman of established character, and in the employ of Messrs. Alexander and Co. of Calcutta, was selected as a fit person to examine the accounts of the parties and to report thereon. On the date above mentioned, therefore, the whole of the books, accounts, documents, and papers were accordingly referred to him. On the 18th of September 1821, Mr. John Abbott submitted his report, accompanied with documents and statements in elucidation of it, and on the 30th of October attended and deposed on oath to the truth and accuracy of the report to the best of his knowledge and belief. The final judgment was passed by the Court of Sudder Dewanny Adawlut in the following terms.

It appears that the reference was made to Mr. Abbott on the 23d day of April last, but from that day to the date of Mr. Abbott's report (a period of above six months) Mr. James Morris neither attended in person before Mr. Abbott, nor appointed any representative to attend, with a view of urging any thing he might have to state, or of giving such explanations as might be required from him. Mr. Morris's refusal to sign the arbitration bond was by no means justifiable, and his nonattendance before Mr. Abbott, either in person or by representative, indicates an intention of preventing any final adjustment of the accounts, and of depriving Mr. Collis of that right which the two decrees passed in his favour by the Provincial Court raised a strong presumption that he was entitled to. It appears therefore to be just and proper, that a decree should be passed in these two causes upon the basis of Mr. Abbott's report above mentioned. From this report it appears that on the 30th of April 1820, there were balances still outstanding, on the joint account, to the extent of 9,089 sicca rupees, 13 anas, 8 pie, many of which, if not already collected, and due diligence heretofore manifested in endeavours to collect them, must now be looked upon as desperate, and the remainder, from the nature of them, and the parties owing them being dispersed in different parts of the country, making it difficult and tedious to collect. To await therefore the eventual result of their close, would put off the final arrangement of the accounts of the joint concern to an indefinite and distant period. The only mode therefore that offers for the attainment of the end sought for in the present suit, of a final adjustment of the accounts between the contending parties, appears to be, to assume the date of the close of the last accounts rendered on the 30th of April 1820, as the period of bringing also to a close the joint concern accounts,

1821.

Mr. James
Morris, v.
Mr. John
Collis.

1821.	when the balance appearing due to John Collis, on his own proper account, was	RS.	A.	P.
		4,498	5	6
Mr. James Morris, v. Mr. John Collis.	The balance due to James Morris on his own proper account was	15,267	2	10
	The difference is the amount due by the joint concern to James Morris, or	10,768	13	4
	For one half of which Mr. Collis is responsible, viz.	5,384	6	8

and on the payment by him of this sum to Mr. Morris, the realized accounts of the joint concern would be finally closed. Previous however to any payment being made by Mr. Collis to Mr. Morris for his half proportion of the above amount due on the joint concern, it is necessary to advert to the particular transactions between them, after the close of that concern, and which forms the prominent feature in the present suit. It appears undisputed that Mr. Morris, on the division being made of the Benares joint stock on the 31st of May 1814, purchased from Mr. Collis, his half share of such stock, for which, by mutual valuation and final adjustment between them at that period, Mr. Morris was to pay to Mr. Collis the sum of 17,685 sicca rupees, by notes at three, six, and nine months, with interest on the two latter at 10 per cent per annum from the 1st of September 1814; it also appears that no payment has ever been made to Mr. Collis on this purchase: he is therefore entitled to an interest on the whole at the rate agreed on from the dates specified on which the interest was to commence, which would make Mr. Morris's debt to Mr. Collis for principal and interest, RS. A. P. on the 30th of April 1820. The sum of..... 27,706 8 0

From which, if Mr. Collis's proportion of amount due to Mr. Morris on the joint concern, as above stated, is deducted

A clear balance will appear due to Mr. Collis by Mr. Morris on the 30th of April 1820, of ... 22,322 1 4

It is therefore ordered and decreed, that Mr. James Morris do pay to Mr. John Collis the sum of 22,322 sicca rupees, 1 ana, 4 pie, with interest at 10 per cent from the 30th of April 1820, to the date of payment.

With regard to the balances still outstanding, due to the joint concern, it appears proper that an impartial division and assignment of them should be made between the parties, each depending on his own exertions for their realization, and that Mr. Morris should be called upon to account for any sums collected by him in part of the outstanding balances since the 30th of April 1820. A copy of the statement of balances on the Benares books marked D. prepared by Mr. Abbott will therefore be forwarded to the Provincial Court, who, in the execution of this decree, will call upon Mr. Morris to render an account of the sums actually collected by him on this account, a moiety of which they will require him to

deposit in Court within one month from the date of being called upon to account, and also to produce and deposit in Court the original bills for outstanding unrecovered debts, of which the Provincial Court are directed to make a fair and impartial division, in such mode as may appear to that Court right and proper.

It was further ordered and decreed, that the whole of the costs of appeal and in the Provincial Court be borne by the appellant, including the sum of eight hundred sicca rupees, which the Court consider a fair remuneration to Mr. Abbott for his trouble in examining and reporting upon the accounts referred to him.

With a view to execution of the above decree, the house and property belonging to the late firm was sequestered by order of the Court of Sudder Dewanny Adawlut, but on the 18th of February 1822, the constituted attorney of Messrs. Fergusson and Co. (merchants and agents of the town of Calcutta) addressed the Provincial Court of Benares with a request that the property might be released, on the ground that those gentlemen, for a large sum due from Messrs. James Morris and Company, held a judgment bond and warrant of attorney dated the 11th of March 1821, which had been duly entered up in the Supreme Court, and that the concern and property under the name and conducted by Messrs. James Morris and Richard Morris belonged to and was carried on for the benefit of Messrs. Fergusson and Co. In support of this requisition the agent submitted copies of the legal documents on which he founded his claim (a). The Provincial Court, on receipt

1821.

Mr. James
Morris, v.
Mr. John
Collis.

(a) To Messieurs Benjamin Comberbach, Augustus Frederick Hamilton, and Charles George Strettell, Gentlemen, Attornies of the Supreme Court of Judicature at Fort William in Bengal, jointly and severally, or to any other attorney of the same Court.

These are to desire and authorise you, the attornies above named, or any one of you, or any other attorney of the Supreme Court aforesaid, to appear for us, James Morris and Richard Morris of Benares, in the East Indies, merchants, in the said Court, as of the first term in the year of our Lord one thousand, eight hundred and twenty-one, or of any other subsequent term of the said Court, and then and there to receive a plaint or declaration for us in an action of debt upon a bond or obligation made and entered into by us, the said James Morris and Richard Morris, to David Clark, Peter Reiersson, John Melville, and John Smith, of Calcutta, merchants and agents, carrying on business in co-partnership, under the names, style and firm of Messieurs Fergusson, Clark and Company, in the penal sum of sicca rupees one hundred and sixty thousand, at the suit of the said David Clark, Peter Reiersson, John Melville, and John Smith, or the survivors or survivor of them, their respective executors and administrators, and thereupon to confess the same action and the jurisdiction of the said Court, or otherwise to suffer a judgment by *nil dictum non sum informatus*, or otherwise to pass against us in the same action, and to be thereupon forthwith entered up against us of record of the said Court for the said debt, besides costs of suit, and we, the said James Morris and Richard Morris, do hereby further authorise and empower you, the said attornies, or any one of you, after the said judgment shall be entered up as aforesaid for us, and in our names, and as our act and deed, to sign, seal, and execute, a good and sufficient release in the law to the said David Clark, Peter Reiersson, John Melville, and John Smith, their heirs, executors and administrators, of all and all manner of error and errors, writ and writs of error, and all benefit and advantage thereof, and all misprisions of error and errors, defects and imperfections whatsoever, had, made, done, committed, suffered, or to be had, made, committed or suffered, in, about, touching or concerning the aforesaid judgment, or in, about, touching or concerning any writ, warrant, process, plaint, declaration, plea, entry or other proceedings whatsoever concerning the same, and for what you the said attornies, or any or either of you

1821.

Mr. James
Morris, v.
Mr. John
Collis.

of this demand, applied to the Sudder Dewanny Adawlut for instructions as to the proper mode of proceeding to be adopted under the circumstances of the case, and in reply they were desired to continue the sequestration until further orders. In the mean time a reference was made to the Advocate General, with a request that he would state his opinion as to the legal competency or otherwise of the appellant to execute the instruments in question, notwithstanding the decree of the Provincial Court, dated the 16th of September 1817, and the decree of this Court amending them, and as to whether the existence of these instruments was sufficient to save the property from being sold for the purpose of realizing the judgment aforesaid. To this reference the Advocate General made the following reply: 'The decree of 1817 referred to

shall do or cause to be done in the premises or any of them, this shall be to you and every of you a sufficient warrant and authority. In witness whereof we have hereunto set our hands and seals, this tenth day of March, in the year of our Lord one thousand, eight hundred and twenty-one.

Signed, sealed and delivered at Benares
in the East Indies, where stamps for
these purposes are not in use.

(Signed) JAMES MORRIS,

(Signed) RICHARD MORRIS.

In the presence of

(Signed) THOMAS YELD, Surgeon,

(Signed) WM. HAMMOND.

At Agra.

(Signed) G. G. CAMPBELL,

(Signed) JOHN RAWLINS.

MEMORANDUM:—It was agreed immediately before the execution of the foregoing warrant of attorney, that no execution should be issued upon the judgment intended to be entered up as in the same warrant of attorney mentioned, unless default shall be made of or in payment by the above named James Morris and Richard Morris of the sum of sicca rupees eighty thousand, with interest at the rate of twelve per cent per annum to the above named David Clark, Peter Reiersen, John Melville and John Smith, or any or either of them, or their or either of their executors, administrators, or assigns, or of all or any such further or other sum and sums of money as shall or may at any time or times hereafter be lent or advanced unto, or which shall or may be paid, laid out, or expended to, for, or on account, or on the credit of the said James Morris and Richard Morris, by the said David Clark, Peter Reiersen, John Melville and John Smith, or any or either of them, or any or either of their executors, administrators or assigns, or by any other person or persons who shall or may become a partner or partners of the said firm of Messieurs Fergusson, Clark and Company, or any other firm of the said house of business for the time being, any or either of them, their, any or either of their executors, administrators or assigns, or which they, the said David Clark, Peter Reiersen, John Melville, and John Smith, any or either of them, or any future partner or partners of the said firm, or other the firm of the said house of business for the time being, shall or may now be or hereafter become bound or liable to pay for or on account of the said James Morris and Richard Morris, their heirs, executors or administrators, or which shall or may appear to be due and owing upon any balance or balances of account between them, the said James Morris and Richard Morris, their executors or administrators, of the one part, and the said David Clark, Peter Reiersen, John Melville and John Smith, any or either of them, their or any or either of their executors, administrators or assigns, or other the firm of the said house of business for the time being, on the other part, or which shall or may appear to be due and owing from the said James Morris and Richard Morris, their executors or administrators, to the said David Clark, Peter Reiersen, John Melville and John Smith, any or either of them, or any or either of their executors, administrators or assigns, or other the firm of the said house of business, for the time being, for the usual and accustomed charges of commission as merchants, agents or brokers or other-

does not accompany the proceedings, and how far that document may have rendered J. and R. Morris incompetent to execute the bond and warrant of attorney to Fergusson and Co., I am not able to determine. I should apprehend, however, that the parties were competent to execute such instruments: But I do not think they would be sufficient to protect property from the execution of other parties suing out execution out of the Supreme Court or any other Court, unless by priority of seizure, and in this case it does not appear that execution has actually issued at the suit of Fergusson and Co. upon the securities in question.

I do not understand how Fergusson and Co. can be made parties in the proceedings of the Provincial Court in the cause between

1821.

Mr. James
Morris, v.
Mr. John
Collia.

wise, together with interest for each and every such sum and sums of money, and balance and balances of account respectively, at and after the rate of twelve per cent per annum from the respective times when and as each and every such sum or sum of money shall be so lent or advanced, or paid, laid out, or expended, and such balance or balances of account shall be struck or made until full satisfaction and payment thereof respectively, without any deduction, defalcation or abatement whatsoever; but that if default shall be made in payment of the said sum of sicca rupees eighty thousand, or the interest thereof, or of all and every or any of such further or other sum or sums of money and interest for the same, and of any part thereof respectively, as aforesaid, or if the life of the said James Morris, or if the life of the said Richard Morris, shall be in danger, then and in any or either of the said cases, execution shall and may be immediately issued for such sum of money as shall be sworn to be due upon the said bond; and it was and is likewise declared and agreed, that it shall not be necessary for the said David Clark, Peter Reiersen, John Melville and John Smith, any or either of them, or the survivors or survivor of them, their respective executors, administrators or assigns, to revive or cause to be revived the said judgment, in case they should not immediately sue out execution thereon, or to do any act to keep the same on foot, notwithstanding the same judgment shall be entered of record for the space of one year or upwards next immediately preceding the teste or issuing of such writ or writs of execution, and notwithstanding any rule or practice of the said Supreme Court to the contrary, and that they, the said James Morris and Richard Morris, their executors or administrators, shall not, nor will have, receive, or take, any plea, exception, proceeding, or other benefit or advantage whatsoever for want of reviving or keeping the said judgment on foot.

Witness.

(Signed) THOMAS YELD, Surgeon,
(Signed) WILLIAM HAMMOND,
(Signed) G. G. CAMPBELL, Surgeon,
(Signed) JOHN RAWLINS.

(Signed) JAMES MORRIS:

(Signed) RICHD. MORRIS.

Know all men by these presents, that we, James Morris and Richard Morris, of Benares in the East Indies, merchants, are held and firmly bound severally and jointly unto David Clark, Peter Reiersen, John Melville and John Smith, of Calcutta, merchants and agents carrying on business in copartnership under the name, style and firm of Messieurs Fergusson, Clark and Company, in the penal sum of sicca rupees one hundred and sixty thousand, of lawful money of Bengal, to be paid to the said David Clark, Peter Reiersen, John Melville and John Smith, some or one of them, their or his executors, administrators or assigns, or their or his lawful attorney or attorneys; for which payment to be faithfully and truly made, we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this tenth day of March in the year of our Lord one thousand, eight hundred and twenty-one. Whereas the above bounden James Morris and Richard Morris, on the day of the date of the above written obligation, are and stand indebted to the said David Clark, Peter Reiersen, John Melville and John Smith, in the sum of sicca rupees eighty thousand and upwards, and in order

1821.

Mr. James
Morris, v.
Mr. John
Collis.

Morris and Collis, unless they voluntarily come on to litigate their rights, and no sale or other disposal of the property sequestered can at all affect their claims if well founded. So far as I can judge from the papers sent to me, this case would cause a good deal of difficulty in an English Court. The suit in the Country Court is only between Collis and James Morris, and the sequestration is or appears to be the joint property of James and Richard Morris. An English Court would allow the creditor of James to take no more than James's share of the joint property upon a fair account between him and his copartner, and the creditor is entitled to no more. I do not see therefore how the Court can order any thing to be sold under the sequestration but James Morris's share. Of course I assume that Richard Morris is no party to the suit

to secure the repayment thereof, and of all such further and other sum and sums of money as they, any, or either of them, or any future member or members of the firm of the said house of business for the time being, shall or may advance, pay, lay out, or expend, or be, or become liable to pay for or on account or by means of the said James Morris and Richard Morris, in any manner howsoever, together with interest for the same respectively, after the rate of twelve per cent per annum, the said James Morris and Richard Morris have agreed to enter into the above written obligation, with such condition as hereinafter is contained. Now the condition of the above written obligation is such, that if the above bounden James Morris and Richard Morris, their heirs, executors, administrators, or any other person or persons on their behalf, do and shall, well and truly pay, or cause to be paid unto the said David Clark, Peter Reiersen, John Melville and John Smith, or any or either of them, or either of their executors, administrators or assigns, the full sum of sicca rupees eighty thousand of lawful money of Bengal, with interest for the same at and after the rate of twelve per cent per annum, and if the said James Morris and Richard Morris, their heirs, executors, or administrators, do and shall, well and truly pay or cause to be paid unto the said David Clark, Peter Reiersen, John Melville and John Smith, or to any other person or persons who shall or may become a partner or partners of the said firm of Messieurs Fergusson, Clark and Company, or of any other firm of the said house of business, for the time being, any or either of them, their or any or either of their executors, administrators or assigns, all and every such further and other sums and sum of money as the said David Clark, Peter Reiersen, John Melville and John Smith, or any or either of them, or any future partner or partners of the said firm, or other the firm of the said house of business, for the time being, shall or may at any time or times hereafter lend or advance, or pay, lay out, and expend, to or for, or on account or on the credit of the said James Morris and Richard Morris, their executors, administrators or assigns, or which shall or may appear to be due and owing upon any balance or balances of account between them, the said James Morris and Richard Morris, their executors or administrators of the one part, and the said David Clark, Peter Reiersen, John Melville and John Smith, any or either of them, their or any or either of their executors, administrators or assigns, or other the firm of the said house of business for the time being, of the other part, or which shall or may be or appear in any such account or otherwise to be due and owing from the said James Morris and Richard Morris, their executors or administrators to the said David Clark, Peter Reiersen, John Melville and John Smith, any or either of them, their or any or either of their executors, administrators, or assigns, or other the firm of the said house of business for the time being, for the usual and accustomed charges of or for commission as merchants, agents and brokers, or otherwise, together with interest upon and for each and every such sum and sums of money, and balance and balances of account respectively as aforesaid, at and after the rate of twelve per cent per annum from the respective times when each and every such sum and sums of money respectively, shall be so lent or advanced, paid, laid out, and expended, and such balance and balances of account respectively shall be struck or made until full payment and satisfaction thereof respectively, without any deduction, defalcation or abatement whatsoever; and also if the said James

with Collis, nor answerable to him. If however the decree of the Sudder Dewanny Adawlut and Provincial Court is right, according to their own rules and forms, Fergusson and Co. must show a prior and better title to the property; which they cannot be precluded from doing by any proceedings either in the Supreme Court or any other Court to which they are not parties; and whether they have a better right or not it is impossible on the facts, as they stand, to determine."

1821.

Mr. James
Morris, v.
Mr. John
Collis.

It appearing from the above that the question had not been distinctly understood, the Court made a second reference, explaining that the object of their former one was simply to ascertain whether, according to the law of England, "any mortgage bond and warrant of attorney to confess judgment, any deed of partnership, or other transfer, absolute or conditional, of personal property, made by a debtor to a third person, subsequently to a judgment had

Morris and Richard Morris, their heirs, executors or administrators, do and shall from time to time and at all times hereafter, well and truly pay and discharge, and completely and effectually, and to the satisfaction of the said David Clark, Peter Reiersen, John Melville and John Smith, their respective executors, administrators and assigns, and all and every other person or persons, who shall or may become a partner or partners in the said firm of Messieurs Fergusson, Clark and Company, or of any other firm of the said house of business for the time being, indemnify them, and every of them, and each and every of their heirs, executors and administrators; and their respective estates and effects from and against all costs, charges, damages, debts, claims and demands, and all and all manner of action and actions, suit and expences whatsoever, which they or any or either of them shall or may sustain, pay or incur, or become or be subject or liable to pay for, or by reason or means of all or any of the premises, then the above written bond or obligation shall be null and void, or else shall be and remain in full force and virtue. •

Signed sealed and delivered at Benares,
in the East Indies, where stamps for
these purposes are not in use. }
In the presence of
(Signed) THOMAS YELD, Surgeon.
(Signed) WILLIAM HAMMOND.

(Signed) JAMES MORRIS.

Signed, sealed and delivered at Agra,
in the East Indies, where stamps for
these purposes are not in use. }
In the presence of
(Signed) G. G. CAMPBELL, Surgeon.
(Signed) JOHN RAWLINS.

(Signed) RICHARD MORRIS.

Notice is hereby given, we have, this first day of April 1821, sold the whole stock in trade, and outstanding debts, &c. due to the late concern of Messrs. Morris and Co. of Benares to Mr. James Morris, and request those gentlemen indebted to the said concern, will pay to Mr. James Morris, or James Morris and Company, Benares.

(Signed) MORRIS & Co.

Notice is hereby given, that Mr. James Morris has this day purchased the whole stock in trade, and outstanding debts, &c. due to the late concern of Morris and Company of Benares, and that he has admitted as a partner Mr. Richard Morris, which concern from this day will be conducted under the name and firm of James Morris and Company. Gentlemen indebted to the late concern of Morris and Co. will be pleased to settle their accounts without delay.

Benares, April 1st, 1821.

(Signed) JAMES MORRIS.

1821.

Mr. James
Morris, v.
Mr. John
Collis.

against such debtor in an action for debt, is or is not sufficient to save such property from being seized and sold in execution of the judgment so previously obtained?" To which second reference the Advocate General replied as follows: "By the law of England, any such transfer, if *bond fide* made, and the property delivered accordingly, must protect such property from the execution on the prior judgment, for it has ceased to be the property of the debtor.

The inconvenience and injustice to purchasers, and the impolicy of fettering property by claims founded upon proceedings of which the purchaser could not or might not be aware, must be obvious. A judgment is no lien upon personal property: and though by the common law a sort of lien was created by the writ of execution, so that it bound the property from its *teste* or date (often prior to the time of its being actually sued out), an act of parliament put an end to the mischief of such liens and incumbrances on the transfer of property, and enacted that no writ of execution should bind the property, but from the time of its delivery to the sheriff to be executed. The principle is, that the party who has obtained a judgment should put it in execution without delay, and that the fair transactions of commerce are not to be embarrassed by rights which he who claims them has not thought proper to enforce.

The whole doctrine of the English law as to the effect of judgments to bind property, real and personal, will be found in *Tidd's Practice*, vol. 2, page 912, (5th ed.) and page 986, and will furnish much more satisfactory information on the subject than any thing I could write.

I ought to add, that any sort of transfer or assignment of property by a debtor must be accompanied by delivery of personal property, or something equivalent to actual delivery, or if the property be mortgaged, or otherwise remain in the debtor's possession, the continued possession of the debtor or seller must be consistent with and explained by the transaction and agreement in that respect. Indeed I have considered the question chiefly with reference to the effect of a prior judgment, to effect a subsequent *bond fide* sale, mortgage, or other transfer by the person against whom the judgment has been obtained."

As there did not appear any sufficient ground for admitting the claim of Messrs. Fergusson and Co. to satisfaction, prior to an adjustment of the claim of the respondent, it was ultimately rejected. As one half of the concern, however, stood in the name of Richard Morris, brother of the appellant, the Court, on a representation of that individual, and after due enquiry into the fact, directed the release of that portion, and the sale of the remainder, to make good the amount of the decree.

BABOO RAMCHUND, Appellant,

1821.

versus

GOVIND DAS, Respondent.

Nov. 1914.

THIS action was brought by the appellant against the respondent in the City Court of Benares, on the 19th of March 1818, to recover the sum of 3,786 rupees, being the amount of interest due on a sum already adjudged. It appeared that the plaintiff had formerly brought another suit against the same defendant in the Benares Court of Appeal, to recover from him the sum of 6,507 rupees, as the principal and interest of a loan advanced to him on the mortgage of a dwelling house. Judgment was passed in his favour, and it was ordered that the defendant should pay to the plaintiff interest on the sum adjudged, at the rate of 12 *per cent per annum*, from the date of the decree up to the day of payment. This judgment was affirmed on appeal by the Court of Sudder Dewanny Adawlut. But as the creditor considered himself entitled not only to interest on the sum due to him from the date of the decision, but also from the date of the institution of his claim, provision for which had not been made in the former judgments, he instituted the present claim as above stated. The defendant did not appear to answer the claim, and on the 23d of August 1809, the suit was dismissed by the Judge of the City Court, on the ground that he was not competent to interfere; the original suit, pending the trial of which the plaintiff claimed interest, having been originally taken cognizance of by the Court of Appeal; observing that, whether the omission to award interest was intentional or owing to inadvertence, the Judge of the Court who passed a decree was the only proper authority to decide in the case of a claim which had its origin in such decree. On appeal to the Benares Provincial Court from the above decision, it was affirmed, on the ground that if the appellant entertained any objections to the provisions of the decree passed by the Court of Appeal, it was his duty to have appealed therefrom to the Court of Sudder Dewanny Adawlut, and not to have instituted a fresh suit in the Court of the City where the matter was not properly cognizable. On a further appeal to the Court of Sudder Dewanny Adawlut, both the above decisions were reversed by the Third and Officiating Judges (S. T. Goad and W. Dorin), who observed, that the present appellant having been the respondent in the former appeal, which was dismissed on default, had no opportunity of urging his objections to the provisions of the original decree, and that in the case of Joogul Kishore and others, *versus* Radhekaunt Ghose, there was a precedent (a) for admitting a new suit to supply an evident defect in a former decree, with respect to interest on the amount adjudged. It was decreed therefore, that the appellant should receive interest at the rate of twelve *per cent* on the original debt, that is 5,000 rupees, from the date of the institution of his suit in the Provincial Court, or the 10th of July 1811, up to the date of its decision by that Court, or the 19th of August 1817, which formed the amount of his present claim. The costs in all three Courts were made payable by the respondent.

A. having sued B. for debt in a Court of Appeal obtains judgment, with an award of interest from the date of the decision. On appeal by B. judgment affirmed on the merits of the case. A. afterwards sues B. in the City Court for interest from the institution of the original suit. Held that the claim is cognizable to supply the defect in the former decree.

1821.

GUNGA MYA, Appellant,

versus

Dec. 17th. KISHEN KISHORE CHOWDHRY and others, Respondents.

According to the Hindoo law, a son adopted, with the permission of her husband, by a woman, on whom her father's estate had devolved, will not be entitled to such estate on his adopting mother's death, but such estate will go to her father's brother's son in default of nearer heirs.

THIS suit was instituted in the Dacca Court of Appeal on the 4th of August 1815, against Kishen Kishore Chowdhry, Mussummaut Jymungla his mother, Mussummaut Annapoorina widow, and Jygopaul son of Dhununjoy, and Mussummaut Daya Mya widow of Kewul Kishen. The claim was to recover a one and half ana share of the zemindaree of Sheerpore, Zillah Mymensing, the hereditary property of the plaintiff's father; the triennial assessment of which was stated at 7,576 rupees.

It was set forth in the plaint, that of seven anas of the above zemindaree, a three and a half ana share was the property of Rughoonundun, the plaintiff's grandfather, but Beernarain, his partner, not giving him possession, the plaintiff's father, in the life time of her grandfather, sued Beernarain, after whose death an amicable adjustment of their disputes was made between his son Birjnath and the plaintiff's father, who obtained a three ana share, of which he continued in joint possession with his brother Govindpershaud, until his death, which event occurred in the Bengal year 1204; that the plaintiff's mother was pregnant at the time of her husband's death, shortly after which the plaintiff was born: that they all continued to live together as a joint and undivided family even after the death of the plaintiff's mother, which occurred in the year 1207 B. S., in which year her uncle Govindpershaud disposed of her in marriage: that he, dying the same year, the plaintiff still continued to live in a state of union, and to enjoy a share of the profits with his widow Jymungla (mother of Kishen Kishore) until the year 1221 B. S.; when the individual last named, separated herself from the plaintiff, assuming the management of the estate, and depriving the plaintiff of her share of the profits, which was a one and a half ana portion; that being the share of Sheonath, of whom the plaintiff was the sole legal heir; that in the time of Govindpershaud sales of part of the estate claimed took place at two different times on account of arrears of revenue, when the portions sold were purchased nominally by Dhununjoy, and Kewul Kishen, who were old servants of the family, and whose names were made use of for the purpose of defrauding creditors, but that they had no real interest whatever, as now falsely alleged, since their deaths, by their representatives, the other defendants.

The following is a sketch of the family in this case:

RUGHOONUNDUN,
(deceased)

BEERNARAIN,
(deceased.)

Sheonath,
died in 1204,
married to
Bhugaruttee,
who died in 1207.

Bishennath,
died in 1197,
childless.

Govindpershaud,
died in 1218,

Gunga Mya, married in
in 1217 to Ramkishub,
who died in 1226.

Kishen Kishore, Respondent.

The defendants, Jymungula and Kishen Kishore, alleged in reply, that Sheonath, the father of the plaintiff, being a leper, made over the whole estate to his brother, and that his wife Bhuguruttee being pregnant at the time of his death; he empowered her, in the event of a son not being born, to execute a deed of gift in favour of Govindpershaud, which she did on the birth of the plaintiff, in the year 1204 B. S.; that the whole property claimed, with the exception of about a 16 gunda share, which had been sold at public auction, belonged to the defendants, and that the plaintiff could have no claim to it whatever. The answer of the other defendants was restricted to the allegation that the purchases, on the part of those whom they represented, were *bonâ fide* transactions. The Third Judge of the Dacca Provincial Court of Appeal, after going through all the evidence adduced in the case, passed a decree on the 18th of November 1819, rejecting the claim of the plaintiff, assigning, among other reasons, that the permission granted by the father of the plaintiff to his wife Bhuguruttee to make a gift of his portion of the estate to Kishen Kishore, and the actual gift, in consequence of such permission, were fully and satisfactorily established. He expressed his opinion, also, that the deed of permission, alleged by the plaintiff to have been executed by her husband, granting her permission to adopt a son, was perfectly unavailable in this case, inasmuch as, if fully proved, it appeared from the doctrine laid down by the pundit of the Court, that the person adopted under such deed could not inherit the property of the plaintiff's father. He considered, however, that the plaintiff was entitled to maintenance from Kishen Kishore, which he adjudged should be furnished to her accordingly.

1821.

Gunga Mya
v. Kishen
Kishore
Chowdhry
and others.

Gunga Mya being dissatisfied with the above decision, appealed therefrom to the Court of Sudder Dewanny Adawlut, and the case coming first to a hearing before the Second Judge (C. Smith) he deemed it necessary to put the following question to the Hindoo law officers:

A person named Sheonath, an inhabitant of Bengal, and proprietor of half an ancestral landed estate, died in the year 1204 B. S., leaving a pregnant widow by name Bhuguruttee, and an uterine brother named Govindpershaud; in the same year his widow brought forth a daughter, which was named Gunga Mya. The widow died in 1207 B. S. Gunga Mya, in the year 1217, B. S. was married to a person called Ramkishub Dutt. Govindpershaud, the original proprietor's brother, died in the year 1218 B. S., leaving Kishen Kishore a son, and Daya Mya a daughter. In the year 1226 B. S., Ramkishub Dutt, the husband of Gunga Mya, died childless. Under these circumstances, it is required to be stated, whether, on the death of the original proprietor, his widow Bhuguruttee, or his brother Govindpershaud, was entitled to inherit his estate? If the widow was the proper heir, whether Govindpershaud, or her daughter, Gunga Mya, was entitled to inherit the estate on her death. If the daughter was the proper heir, and if she by consent of her husband adopted a son, whether such adopted son was entitled to inherit the estate on her death; and if he was not, who was the proper heir on whom the estate should devolve after the death of Gunga Mya.

1821.

Gunga Mya
 & Kishen
 Kishore
 Chowdhry
 and others.

To the above question, a reply was submitted to the following effect: On the death of Sheonath his property belonged, of right, to his widow Bhuguruttee, and not to his brother Govindpersahad. For the estate of him who dies leaving no other heir, down to a great grandson, devolves, by the law of inheritance, on his widow. On the death of Bhuguruttee the estate which she had inherited from her husband, should devolve on her daughter, who was unmarried at the time of her husband's death, and not on the brother of Sheonath, for, by the law of inheritance, of the three descriptions, of daughters, that is, the unmarried daughter, the married daughter whose husband is living, and of whom there is a probability of a son being born, and the daughter who has borne a son, the first mentioned has the best title to the succession in default of other preferable heirs; but the son adopted by Gunga Mya, by the consent of her husband, has no title to the estate to which she had succeeded, because, according to the *Daya Bhaga*, an adopted son has no legal claim to the property of a *Bandhu* or cognate, and according to the interpretation of the text of *Menu*, which admits adopted sons to the right of succession collaterally, the meaning is, succession to the property of persons belonging to the same family as the adopting father, as fully appears from the *Munwartha Mook-tavulee* compiled by *Culluca Bhatta* and other authorities. On the death of Gunga Mya, therefore, the estate left by her father, to which she had succeeded on the death of her mother, and her right to which was limited to a life interest, should devolve on Kishen Kishore, the brother's son of her husband, because when an estate devolves on a childless widow, who is held to be half the body of her husband, it reverts at her death to the heirs of her husband. So an estate which had devolved on a daughter, who has a weaker claim, should, *à fortiori*, revert to the heirs of her father.

AUTHORITY:—The text of *Yajnyawalkya*, cited in the *Daya Bhaga* and other law tracts: “A wife, daughters, both parents, brothers, their sons, kinsmen sprung from the same original stock, distant kindred, a pupil and a fellow student in theology, on failure of the first of these, the next in order shares the estate of him who has gone to heaven, leaving no male issue.” On the 31st of October 1821, after perusing the above opinion, and the other documents filed in appeal, the Second Judge pronounced judgment in the following terms: The story of the permission, by the father of the plaintiff, to his wife Bhuguruttee to make over his portion of the estate by gift to his brother, and of her acting under such permission, appears to be entirely a fabrication. The real facts of the case are, as set forth in the question propounded to the pundits of this Court. The length of time which elapsed previously to the institution of the suit, and which was assigned by the Court below as one reason for its rejection, has been satisfactorily accounted for by the appellant, on the score of her nonage. It also appears from the evidence adduced in the case, that those of the respondents who hold portions of the lands claimed in virtue of auction purchases, are really, as stated in the claim, merely nominal owners, and that the purchases were not *bona fide*, but were made with the proceeds of the estate in dispute. From the opinion of the pundits, it is established that

the appellant is the lawful heir on the death of her mother, and that Kishen Kishore has no claim to the succession; but that opinion goes on to state that the appellant has only a life interest, and that on her death the estate should revert to the son of her father's brother. It is therefore proper that the decree of the Court below should be annulled, and that a one and half ana share of pergunnah Sheerpore should be awarded to the appellant, to be held by her on the restricted tenure described in the *vyavastha*. But if the appellant should hereafter, in conformity to the permission granted to her by her husband, adopt a son, such adopted son (if he think that the doctrine laid down in the opinion above cited is unjust) will be at liberty, on the death of the appellant, to sue her husband's brother's son or his heirs for the recovery of the share to which he may consider himself entitled. The respondent, Kishen Kishore, was made answerable for the costs of the appellant in both Courts, and the other respondents were made responsible for their respective costs. The appellant was further declared at liberty to sue for mesne profits during the period of her dispossession. The cause came next to a hearing before the Third and Officiating Judges (S. T. Goad and W. Dorin) who recorded their opinion to the following effect: This case seems to hinge on two points; in the first place, at the death of Mussumant Bhugurutte, widow of Sheonath, father of the appellant, was the appellant entitled to inherit the estate which had belonged to her father? In the second place, of what extent was the estate left by Sheonath? No reliance can be placed in the story of the permission granted by the plaintiff's father to his wife, and of her gift under such permission. Indeed the respondent, Kishen Kishore, has himself retracted this plea. It appears from the evidence adduced in this case, that Sheonath, the father, died in the year 1204. B. S.; and that his widow Bhugurutte died in the year 1207. At that time the plaintiff was an infant; and it appears from the exposition of the Hindoo law, as delivered by the pundits, that, on default of male issue, the daughter of whom there is a probability of a son being born, is entitled to inherit the estate of her father. That estate, in the present instance, consisted of a three ana share of the pergunnah Sheerpore; for the whole zamindaree above specified was the share of Rughoonundun Chowdhry, who had three sons. The second son, Bishennath died childless, leaving his two brothers Govindpershaud and Sheonath. It is also proved that these two brothers, while they lived, retained full possession jointly of the whole three ana share, and that the auction purchases alleged by the other respondents were wholly fictitious: and although such fictitious purchases are now prohibited by the 7th regulation of 1799, yet these transactions took place before the promulgation of that enactment. Under these circumstances, the one and half ana share of the estate left by Sheonath should by law have devolved on his daughter at the death of his widow, which occurred in 1207. B. S.; since which period, by reason of her minority, her rights have been usurped by Govindpershaud and Kishen Kishore. She has clearly a right to this portion during her life time; but it does not appear necessary or proper, in the present decree, to make provision for more than the matter in dispute. The two Judges

1821.

Gunga Mya
v. Kishen
Kishore
Chowdhry
and others.

1821. therefore recorded their sentiments in unison with that of the Second Judge, with exception to that part of his judgment which alluded to the contingency of an adoption by the appellant under the authority of her late husband, and the right of the son so adopted to prefer a claim to the estate in virtue of his adoption.

Gunga Myn
v. Kishen
Kishore
Chowdhry
and others.

1821.

PERSHAD SINGH (Pauper), Appellant,

versus

RANEE MUHESREE, Respondent.

Dec. 17th.

According
to the Hin-
doo law,
an illegiti-
mate son
of a Raj-
poot or
any of the
three supe-
rior tribes,
by a wo-
man of the
Sudra or
other infe-
rior class is
entitled to
mainte-
nance only.

THIS claim was preferred by Pershad Singh in *forma pauperis*, in the Provincial Court of Moorshedabad, on the 21st of January 1817, for possession of pergunnah Sultanabad, situated in the zillah of Bhaugulpoor, the triennial assessment of which was stated at 37,982 rupees. The ground of the claim was that the plaintiff was son of the late proprietor, Rajah Mohukkum Singh, by a woman of the *Dhanook* tribe, though born out of wedlock, and that the Rajah having died without male issue, he (the plaintiff) was entitled, by the custom of the family, to inherit his property; but that he was excluded from his right by the widow Muhesree, who had usurped the estate, and against whom he brought the present action. The defendant replied by alleging that her late husband was a *Rajpoot*, and that the defendant's mother was a low woman of the *Dhanook* tribe, with whom her husband could not have had lawful connexion; that she had three daughters (one of whom is married, and has a son named Rughoonundun) by her husband, who, finding that he had no male issue, authorized her to adopt a son, of which permission she intended to avail herself; that she had been in undisturbed possession for upwards of fourteen years; and lastly, that there was no such custom in the family as that alleged by the plaintiff of admitting illegitimate children to the rights of inheritance. On the 19th of February 1818, the Senior Judge of the Moorshedabad Court rejected the claim, on the ground that the plaintiff had shewn no just title, that he had admitted his mother was unmarried, and of a different tribe from his alleged father, that the custom of the family had not been established, but rather disproved, by the fact that the late Rajah had given his wife (the defendant) permission to adopt a son, and that in this case there were daughters, and a daughter's son, who had a clear and indefeasible right of inheritance. An appeal having been preferred from this decision to the Court of Sudder Dewanny Adawlut, the cause came to hearing on the 12th of September 1820, before the Second Judge (C. Smith). It appeared that of the three daughters of the respondent only one survived, and that she had a husband named Dyachand, and a son named Rughoonundun. A reference to the pundits in this case being deemed requisite, the following interrogatory was propounded to them: Mohukkum Singh, a *Rajpoot*, died leaving a widow and a daughter, which daughter was married, and had a son;

Mohukkum Singh had, besides the above, an illegitimate son named Pershad Singh, born of a low woman of the *Dhanook* tribe. Under these circumstances, is such illegitimate son entitled to any portion of his father's property? To this question the pundits replied, that the illegitimate son was not entitled to any specific share, but that he had a right to maintenance, it being provided by law, that the son, by a *Sudra* woman, of a man belonging to any of the three superior classes, should be allowed a sufficiency for his maintenance. The same rules that apply to illegitimate children by *Sudra* women are applicable also to the spurious offspring of women belonging to any of the inverse tribes. 1821.

AUTHORITIES.—The text of *Goutama*. A son by a *Sudra* woman, born unto a man who leaves no legitimate offspring, shall, if he be strictly obedient like a pupil, receive a provision for his maintenance.

Chandeswara.—"To sons produced by women in the inverse order of the classes, a subsistence shall be allotted in the same manner in which it is assigned to the son of a *Sudra*, provided they be strictly obedient to their parents." On perusing the above opinion, the Second Judge deemed it advisable to refer the case back to the Moorshedabad Court of Appeal, in order that additional evidence might be taken as to the custom alleged to prevail in the family of Mohukkum Singh and other neighbouring *Rajpoots*, and as to the question of who were the real parents of the appellant. This evidence having been taken by the Court of Appeal, the case was returned to the Court of Sudder Dewanny Adawlut, and was again, on the 31st of October 1821, referred to the pundits, who were desired to state whether under the additional evidence taken, the appellant was entitled to inherit the estate of Mohukkum Singh, notwithstanding the fact of his having been begotten on a woman of the *Dhanook* tribe, and there being the widow, a daughter and an son of the late proprietor alive. On the 27th of November pundits gave in their second opinion, to the effect that six witnesses, on the part of the appellant, had deposed to his being the son of Mohukkum Singh by a woman named Sohagee of the tribe of *Dhanook*, who was the concubine of the said Mohukkum Singh; that Mohukkum himself was the son of Kulean Singh by his concubine, named Jymunee, a woman also of the *Dhanook* tribe; that the said Kulean Singh was himself also the offspring of a *Dhanook* woman, and that in this manner many *Rajpoots* of that neighbourhood are begotten on women of the *Gwala*, *Hujjam* and other inferior classes; that if there was any truth in the evidence of the witnesses, the appellant had a right to the property moveable and immoveable of the deceased Mohukkum, conformably to the usage of the family, notwithstanding the existence of the other claimants specified. On the same day, the Second Judge, with reference to the doctrines contained in the two law opinions, and to the circumstances of the case, recorded his opinion that it would be an equitable award to permit the widow of Mohukkum, to continue in possession of his estate during her life time, and to provide for its devolving at her death on the appellant or his heirs. Judgment was given by him amending the decree of the Court below accordingly. On the 17th of December the cause came ultimately

1821.
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 Pershad
 Singh, v.
 Ramee Mu-
 hesree.

to a hearing before the Third and Officiating Judges (S. T. Goad and W. Dorin) who differed in opinion with the Second Judge, and a final decree was passed on the above date to the following effect: The appellant claims the estate of Sultanabad, on the ground of his being the illegitimate son of Rajah Mohukkum Singh, the late proprietor, by a woman of the *Dhanook* tribe, and on the ground of its being the usage of the family that an illegitimate son should succeed in default of a legitimate son. It appears to the Court to be proper that the most satisfactory evidence should be adduced to justify a belief in the existence of an usage which confounds all distinction between lawful and unlawful issue. Such evidence has not been adduced by the witnesses of the appellant on the present occasion. It remains therefore to be ascertained whether or not the appellant was the son of Mohukkum Singh by an unmarried woman. If he was so, according to the doctrine contained in the first opinion delivered by the pundits, he is entitled to maintenance out of the estate. On this point, however, the witnesses of the parties differ, nor is there any reason for assigning a preference to the witnesses of the appellant. Where parties are actually married, it is a fair presumption that the husband is father of the issue of his wife, but where a person is born out of wedlock, the clearest evidence should be adduced to establish the fact of parentage. No sufficient proof has been in this case brought forward that Mohukkum was the father of the appellant. His want of title is confirmed by the fact of the widow having been in undisturbed possession ever since her husband's death. On these grounds the two Judges over-ruled the opinion of the Second Judge, and affirmed the decision of the Court below, dismissing the appeal, and directing that the costs of this Court should be defrayed by the appellant, should any assets belonging to him be subsequently discovered.

1822.

TOHFA DIBIA, Appellant,

versus

PIRTHEE CHUND RAI, Respondent.

Jan. 20th.

A judicial order for the payment of a monthly stipend to a certain individual is not held to entitle his heirs to claim it after his death.

THIS was an action brought by the appellant *in forma pauperis*, on the 9th of May 1810, in the Provincial Court of Moorshedabad, against the present respondent, to recover the sum of 12,267 rupees, claimed as arrears of a monthly subsistence.

The plaintiff's husband, Rughoonundun Rai, and his brother Byjnauth (according to the statement in the plaint) entered upon the joint possession of pergunna Attar, their hereditary property.

Two years after the death of Byjnauth, when the plaintiff's husband, Rughoonundun, took possession of the estate in dispute, Deves Pershad, son of the deceased Byjnauth, brought an action against him, claiming possession of the whole of the said pergunna. Mr. Cleveland, the Judge who tried the case, passed a decree in his favour, but directed that he should pay a certain monthly

stipend to Rughoonundun Rai. A suit was then instituted by 1881.
Rughoonundun claiming a portion of the estate, but the Judge
before whom the case was brought dismissed it, after examining
the decrees above mentioned, assigning at the same time the month-
ly stipend of forty rupees out of the funds of the said pergunna
for the plaintiff's subsistence, and issued a *purwannah* to the
Tehsildar of the pergunna (which at that time was in the hands of
the Collector) for the payment of the same, which order was carried
into effect accordingly.

Tohfa
Dibia, &
Pirthee
Chund Rai.

When Pirthee Chund, however, came into possession of the
property, the payment of this stipend was not duly made, and
Rughoonundun Rai appealed to the Provincial Court claiming a
portion of the estate. This suit was also dismissed, and the
monthly subsistence, agreeably to the former decisions, was
recognized as being due.

Rughoonundun Rai then appealed to the Sudder Dewanny
Adawlut, but died previously to the final decision, and Tohfa Dibia
appearing as the heir and representative of the deceased, the
Judges before whom the cause came to a hearing, saw no reason
to alter the decree of the Court below, and affirmed it in all respects
accordingly.

On these grounds the plaintiff, Tohfa Dibia, claimed the sum
above named as arrears due on account of the stipend fixed by the
Court at the rate of forty rupees *per mensem* from the date of
Mr. Cleveland's decree, on the 26th of *Kartick* 1188, up to the
month of *Asarh* 1216, B. S. after subtracting the sum of 1,201
rupees, stated to have been already received.

The defendant, in answer, denied the plaintiff's claim generally,
and more especially that part of it relating to the monthly stipend
of forty rupees alleged to have been fixed. He stated, moreover,
that the husband of the plaintiff, instead of the subsistence to
which he was entitled by the decree of Mr. Cleveland, had taken
from the defendant a portion of land, and had continued in pos-
session of the same during his life time, after which the plain-
tiff took possession of it; that the defendant had occasionally,
through charity, assisted the plaintiff, but that no regular stipend
had ever been paid, on which account, after so long a time had
elapsed, this claim, which the plaintiff had set up, was by the law
of the Court totally inadmissible. On the 9th of February 1814, the
Senior Judge of the Provincial Court passed a decree to the fol-
lowing effect: According to the decision passed by Mr. Cleveland,
under date the 9th of November 1781, which, owing to there being
no appeal from it, was final and conclusive, and the decision dated
13th of August 1794, which was affirmed by the Provincial Court
and the Sudder Dewanny Adawlut, it is clear that the right to
the estate was decreed in favour of Daves Pershaud, the brother of
the defendant, and likewise that subsistence was awarded to the
plaintiff's husband: but none of the decrees aforesaid contain any
thing respecting the descent of the monthly subsistence, or of its
being inheritable by the plaintiff, nor is there any proof adduced
by the plaintiff to this fact. On this ground, and considering the
extreme poverty of the estate, it does not appear equitable to cause
payment of forty rupees *per mensem*.

1821.

Tobfa
Dibia, v.
Pirthee
Chund Rai.

But since the defendant declares his readiness to pay the monthly sum of eight rupees, on consideration of the plaintiff giving up the land which had been taken in lieu of subsistence, to which the plaintiff's *vakeels* agree, it is ordered that the suit of the plaintiff be dismissed, that the plaintiff deliver up whatever portion of land may have been taken in lieu of subsistence, and that the defendant pay the monthly sum of eight rupees to the plaintiff during her natural life, and that each party be responsible for their respective costs.

The plaintiff not being satisfied with this arrangement, appealed in *forma pauperis*, to the Court of Sudder Dewanny Adawlut. The cause came to a hearing before the Second Judge (C. Smith) on the 8th of May 1821, and after the whole of the papers had been perused, a proceeding was recorded in the following terms: It appears that the decree passed by Mr. Cleveland, dated 9th of September 1781, contains an order for Rughoonundun's obtaining subsistence, without specifying any precise sum. The appellant has stated that the monthly subsistence, agreeably to the preceding decree, had been regularly received by her husband, who, when the respondent (Pirthee Chund) commenced withholding its payment, brought an action for a portion of the estate. From this declaration of the appellant, it appears clearly that her claim, as far as it refers to a period preceding the suit brought by her husband, is futile, since she herself declares to the receipt of the stipend up to the time of the suit, and that, in consequence of its ceasing to be paid, the action was brought by her husband. The date of the action brought by the appellant's husband for the recovery of a portion of the pergunna, in the Zillah Court of Bhaugulpoor, was the 9th of May 1794, corresponding with the 29th of *Bysakh* 1201, B. S., and although the precise date of Rughoonundun's death does not clearly appear, it may nevertheless be concluded from the records of this Court in the abovementioned case, that he died about the beginning of the year 1208, B. S. It is therefore clear that the appellant's claim must relate to the intervening period between the beginning of the year 1201, and the beginning of the year 1208, B. S. Her suit for arrears during the whole time comprized between the beginning of the year 1188 and the end of 1216, is perfectly futile. And although Mr. Cleveland, it is true, passed a decree awarding a monthly subsistence to Rughoonundun, yet there is no mention in it that any claim for such subsistence shall endure after his death. It becomes necessary therefore to ascertain two points; first, the sum obtained as subsistence by Rughoonundun under the decree of Mr. Cleveland? next, what claim the appellant has to such subsistence after the death of her husband?

Further evidence was called for from the Courts below, and the opinion of the pundits of the Sudder Dewanny Adawlut was taken as to the legality of the claim of the appellants to the subsistence. The case was stated to them as follows: "Ajudharam died leaving two sons named Byjnauth and Rughoonundun. After the death of the former, his son, an adult, brought an action against Rughoonundun his uncle, and obtained a decree in his favour; it being ordered that Rughoonundun should obtain subsistence from his nephew Derve Pershaud. After the death of Derve Pershaud

1822.
Tahfa Dibia, v. Pirthee Chund Rai.

aforesaid, his younger brother Pirthee Rai took possession of the estate, soon after which Rughoonundun died, leaving a wife and a young son who shortly after died. At this time Pirthee Rai, nephew of Rughoonundun, and Tahfa Dibia, wife of the said Rughoonundun, are the survivors. Is the latter entitled to claim subsistence from the former under these circumstances?

On the 15th of May the pundits gave the following answer: "Agreeably to the decree issued in favour of Rughoonundun, Tahfa Dibia, his wife, is entitled to claim subsistence from Pirthee Rai, because the obtaining of subsistence by Rughoonundun from his brother was fixed by a decree of Court, and awarded to him by order of the Judge. The claim therefore of Rughoonundun is indefeasible and descended to his son after his death, and after the death of the son, which happened without his leaving any child to destroy Tahfa Dibia's claim to the inheritance, that claim vested in her." On the 5th of November 1821, further evidence having been received, the Second Judge recorded his opinion, that the claim of the appellant to forty rupees *per mensem* was excessive. It was thought, on consideration of the means of the respondent, and the value of the estate, that a monthly stipend of ten rupees would be an adequate allowance.

The Second Judge therefore gave his opinion that the decree of the Provincial Court of Moorshedabad, dated the 9th of February 1814, should be amended, and that Pirthee Chund Rai, the respondent, from the beginning of the year 1208 F. S., should pay arrears to the appellant, at the rate of ten rupees *per mensem*, which, up to the time of his judgment, would amount to the sum of 2,540 rupees, and that he should regularly pay the same for the future, commencing from the first of the month of *Aghun* 1229, F. S., during the life of the appellant.

The cause came again to a hearing on the 18th of December 1821, before the Third and Officiating Judges (S. T. Goad and W. Dorin). They were of opinion that the decree respecting Rughoonundun referred to him alone, and was not an award of property which should devolve on his heirs; for, if the subsistence fit for one person necessarily descended to his heirs, it would follow that what was intended for the maintenance of one only might be divided amongst many. The pundits were required to state the authorities in which it was laid down that a monthly stipend should devolve on the heirs of the stipendiary, there not being any precedent of a decision to that effect in the records of the Court of Sudder Dewanny Adawlut. The pundits replied, that any thing obtained as a gift from the ruling power, resembled that which had been obtained by partition among brethren, or by purchase, or by inheritance, and as the claim of the obtainer of property by partition among brethren, or by purchase, or by inheritance, was indefeasible, so was the claim of him who obtained property by the award of the ruling power. Whatever the ruling power may appoint for subsistence, in any of the established modes, that is termed by the wise a *Nibundha* or *Corrady*; and is descendable to the sons and grandsons of him who obtains it. "Like as is the power of fate over the affairs of mortals, so is that of the ruling power; he has power to give and to cause to give." When Rug-

1822. hoonundun disputed with his brother's sons, and was excluded from a share in the inheritance, the Judge of the Zillah fixed a subsistence for him, to be paid by his nephews, and that maintenance was obtained as a gift from the Judge. If it was the intention of the Judge that the maintenance should be fixed only for Rughoonundun's life, then there could be no foundation of a claim on the part of his heirs; but if, on the contrary, the intention was that it should descend to his heirs, their claim was certainly maintainable. This doctrine was stated to be in conformity to the *Vyuvahāra Matrika*, *Daya Bhāga* and other Shasters.

Tobfa Di-
bia, v.
Pirthee
Chund Rai.

The above opinion not being by any means definite or decisive on the question of law, and the Judges being of opinion that the intent of the decree was to limit the subsistence to the life time of Rughoonundun, the claim laid to the inheritance of it was considered untenable, but the order contained in the decree of the Provincial Court relative to the payment of eight rupees *per mensem*, with the consent of the other party, was upheld. The appeal was accordingly dismissed and the decree of the Provincial Court affirmed.

The respondent was directed to pay to the appellant subsistence at the rate of eight rupees *per mensem*, from the date of the decree of the Provincial Court, and it was ordered that the land (if any) in possession of the appellant, in exchange for the subsistence, should be given up to the respondent; each party paying their respective costs: in consideration of the appellants having pleaded *in forma pauperis*, and the small stipend possessed by her, it not being thought equitable to charge her with the whole costs of suit.

1822.

BHOWANEERSHAD GOH, Appellant,

versus

MUSSUMMAUT TARAMUNEE, Respondent.

Feb. 28th.

According to the Hindoo law, as current in Bengal, a coparcener may dispose of by gift or otherwise his own undivided share of the ancestral landed property, notwithstanding he may have a daughter and a daughter's son living.

On the 26th of May 1812, Manik Mala, and Gooroopershad Goh, brought an action against Radhakishen, in the Provincial Court of Dacca, by permission of the Sudder Dewanny Adawlut, (the property being partly subjected to the jurisdiction of Zillah Backergunge, and partly to that of the city of Dacca) to recover a 1 ana, 1 pie share of the zemindaree of the pergunnahs of Edulpoor, Rahimabad and Shaista Nuggur and other landed property, the annual produce of which was averaged at 2,500 rupees. It was stated in the plaint, that the property in question was the hereditary property of Rajkishen (father of Manik Mala and maternal grandfather of Gooroopershad Goh,) and of Radhakishen the defendant. Rajkishen died in the Bengal year 1210, leaving as heirs a daughter, Manik Mala, and Gooroopershad (the plaintiffs), with Bhowaneershad and Kaleershad infants, grandchildren by his daughter's side; and on his death his widow burning herself with his body, the said defendant, in the beginning of the same year, took forcible possession of the whole landed property, to half of which, as the property left by Rajkishen, the plaintiffs were by the Shasters legally entitled.

On the death of Radhakishen, the defendant, his widow Taramunee and Chunder Cala, mother of the infant Casheershad and widow of Caleeshunker Rai, deceased son of Radhakishen, appeared in Court as heirs of the defendant. It was contended on behalf of the widow Taramunee, that she had purchased a considerable part of the landed property claimed, with her own peculiar funds, and that with respect to that part of the property which was the *bond fide* hereditary property of Rajkishen and Radhakishen, the former individual, in the Bengal year 1210, after having made a provision for the plaintiffs and certain other relations, and appropriated a portion to religious uses, had executed a deed of gift of his proper share in favour of Caleeshunker, son of the defendant. This being the case, and likewise considering that the infant Casheershad was the rightful heir of his father Caleeshunker deceased, the claim of the plaintiffs on the property could not hold good. The reply of the other defendant was nearly to the same effect.

1822:

Bhowaneershad
Goh, v.
Mussumaut Taramunee.

After the evidence had been gone through, Manik Mala, one of the plaintiffs, filed a *razeenamah*, stating the truth of what was urged in the defendant's answer, acknowledging the authenticity of the deed of gift executed by Rajkishen in favour of Caleeshunker, and withdrawing from the action. The Officiating Judge of the Dacca Court of Appeal, after attentively weighing the evidence adduced on both sides, considering the deed of retraction to have been executed voluntarily, deeming the deed of gift alleged to have been executed by Rajkishen to be fully proved, and referring to the case of Eshanchund Rai *versus* Eshorchund Rai, decided by the Court of Sudder Dewanny Adawlut (a), as evidence of the validity of the gift which that deed purported to convey, passed a decree confirming the deed of gift, and dismissing the suit, and ordering that the defendants, who were confirmed in the possession of the share of the plaintiff's maternal grandfather, should be responsible for the subsistence of the plaintiff, if no other means of maintenance should have been assigned.

Gooroopershad, not satisfied with this decree, preferred an appeal against Taramunee (Chunder Cala having died in the meantime) stating the triennial assessment of the property claimed to be 3,294 rupees. The appeal was at first dismissed on the 30th of May 1821, by reason of the default of the appellant; but on the 10th of February 1822, it appearing from a certificate of the Provincial Court of Dacca that Gooroopershad had died before the dismissal of his appeal, and that Bhowaneershad, brother of the appellant, was living, an order was issued for the restoration of the cause to the file, and for the admission of the last named individual to prosecute the appeal. The cause came originally to a hearing before the Second Judge (C. Smith), and as it did not appear that the opinion of the pundits had been taken on the subject of the alleged deed of gift, it was ordered that they should be questioned whether or no Rajkishen, the father of two daughters, one unmarried, the other having male offspring, all living, could lawfully execute a deed of gift of all his property in favour of

(a) Vide vol. 1, page 2.

1822. Caleeshunker? In answer to which the pundits gave a *vyavastha* holding the affirmative side of the question. (a)

Bhowaneepershad Goh, v. Mussum-maut Taramunee. From the absence of any sufficient cause to account for the execution of the alleged deed of gift by Rajkishen, from its not having been registered, and from other circumstances, its authenticity not having been sufficiently established in the opinion of the Second Judge, and Manik Mala after entering the *razeenamah* having stated it to have been obtained from her by the fraud of the opposite party, so that it could not weigh in favour of the respondent, or nullify the claim of the other plaintiff, whose representative the present appellant was, he recorded his judgment that the decree of the Dacca Court of Appeal should be reversed: and the case was accordingly made over for the consideration of another Judge. The appeal having next been brought under the consideration of the Fourth Judge (J. Shakespear), he stated his opinion to the following effect:

It appears that the brothers Rajkishen and Radhakishen, sons of Roodernarain, possessed the zemindaree of Eedulpore, and some other talooks in coparcenary. The former died in the year 1210 B. S., leaving one daughter unmarried, and another with her three sons, named Gooroopershad, Kaleepershad and Bhowaneepershad. Having no sons himself, he, in the year 1210 B. S., executed a deed of gift in favour of his nephew Caleeshunker Rai, then ten years of age: after the death of Rajkishen, his brother Radhakishen took possession of the estate jointly with his son Caleeshunker, who died in the Bengal year 1210, and in 1211 his father died also, since which the zemindaree has been in possession of Taramunee the widow of Radhakishen. It appears also that Manik Mala, daughter of Rajkishen, and his grandson Gooroopershad, formerly brought an action against Radhakishen in the Provincial Court of Dacca, on the ground of his having taken unjust possession of the whole estate. On the death of Radhakishen, Taramunee his widow, and Chunder Cala the widow of Caleeshunker, replied to the claim by stating that Rajkishen before his death had set aside a portion of land as a subsistence to Manik Mala and his grandsons, after which he had made over the rest of the property to Caleeshunker, by virtue of which they were in possession of the estate. Manik Mala afterwards retracted from the suit, and the plaint was dismissed by the Provincial Court, which at the same time confirmed the possession of the defendants according to the deed of gift. From the evidence adduced, a sufficient cause for the execution of the deed of gift by Rajkishen

(a) In support of this doctrine the pundits cited the following half stanza of a text of *Nareda* cited in the *Daya Bhaga*, "should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." The first stanza of the text is, "When there are many persons sprung from one man, who have duties apart and transactions apart, and are separate in business and character, if they be not accordant in affairs," &c. It does not, however, appear that the omission of the first stanza of the text was made with any improper design, or that there was any inaccuracy in the doctrine here laid down, as far as the law of Bengal is concerned. Mr. Colebrooke observes, in a note to his translation of the *Daya Bhaga* (see page 33), that the above text of *Nareda*, as quoted by *Jimuta Vahana*, is apparently understood as relating equally to divided and undivided shares.

in favour of Caleeshunker has been made out, inasmuch as at the time when it was written, the donor had no son, and his nephew Caleeshunker was grown up, and had attained the age of eighteen years. Besides, it is plain from all the proceedings, that Rajkishen had before his death set aside a portion of his estate for the support of his daughter and his grandsons. Indeed, without advertg to the witnesses of the respondent, from those of the appellant alone, the facts of the subsistence being allotted to the daughter and grandsons, and the execution of the deed of gift, are fully established. In consideration of these circumstances, therefore, and the opinion of the pundits, that Rajkishen had a right to dispose of his property as he pleased, the Fourth Judge was of opinion that the decree of the Provincial Court of Dacca should be affirmed. In consequence of this difference of opinion between the two Judges, the case was sent for decision before a third, and having been attentively considered by the Officiating Judge (C. Elliott), he declared his opinion, that the deed of gift was authentic, and from the opinion of the pundits of this Court, it being proved that the donor had a right to execute the said deed, it did not appear to the Judge that any other cause was necessary to its validity than the will and pleasure of the writer. This opinion therefore coinciding with that of the Fourth Judge, the decree of the Dacca Provincial Court was affirmed, and the appeal dismissed with costs.

1822.

Bhowanes-
pershad
Goh, v.
Mussum-
maut Tara-
muned.

MUSSUMMAUT CHUTROO, Appellant,

1822.

• versus

MUSSUMMAUT JUSSA, Respondent.

Mar. 28th.

THE respondent, Jussa, was plaintiff in an action brought against Chutroo in the city of Benares, on the 2d of December 1815, for the recovery of 1,400 rupees, on account of a monthly allowance due agreeably to a written engagement. The defendant suffered judgment to go by default. On the 24th of February 1818, the Register of that Court dismissed the suit of the plaintiff on the following grounds :

The suit appeared to be founded on the plea, that the defendant had been entirely brought up and educated by the plaintiff. The defendant leaving her and going to live with Baboo Surub Jeet Sing, the plaintiff preferred a complaint in the Foujdarry Court against the said Baboo, in which she stated that Chutroo had executed a written obligation, promising to pay monthly to her mistress, that is to say, the plaintiff, the sum of twenty-five rupees, not however specifying the period during which the allowance was to continue. A compromise was made and the defendant Chutroo paid to Jussa 750 rupees, or a sum sufficient to recompense her for her care and instruction. The written engagement on which the present action was brought did not specify that the plaintiff was to receive the said sum during her life; and though at the time of its execution, the defendant, then a young girl, had it in her power to have given more, yet owing to her advanced age she did not then appear to be able to pay such a sum.

A dancing girl having left her mistress by whom she had been purchased when a child and educated, and having discontinued the payment of a monthly allowance to which she had bound herself by a written obligation; on a suit by the mistress to enforce the engagement or recover the

1822.

girl, claim disallowed, the girl not being legally a slave, and the mistress not having proved that what had already been received was insufficient to cover the expence of her education.

On these grounds the suit was dismissed, and the costs made payable by the respective parties; on this the plaintiff, Jussa, appealed to the Provincial Court of Benares. The Third Judge of that Court (in conformity with the opinion of the Senior Judge) deeming the authenticity of the written obligation to be sufficiently established, and being of opinion that so long as Mussummaut Chutroo was not under the control of her mistress, the latter had a right to the monthly stipend above mentioned, and that it was proved from the proceedings in the Foujdarry Court, that the former had absconded with various ornaments and wearing apparel belonging to the latter, for which no equivalent had yet been received, reversed the decree of the Register, and passed a decision in favour of Mussummaut Jussa, directing that she should receive from Chutroo the sum of 1,400 rupees on account of the monthly stipend of 25 rupees from the 8th of February 1811 up to the 8th of October 1815: also 1,175 rupees on account of the same allowance from October the 8th 1815, up to the 8th of September 1819, and in future from the 8th of September 1819, as long as the latter remained out of her control she was to pay her monthly the sum of 25 rupees: From this decree Chutroo was allowed to bring a special appeal to the Court of Sudder Dewanny Adawlut. After attentively going through all the proceedings, the Chief and Officiating Judges (W. Leycester and W. Dorin) before whom the case was finally heard, on the 25th of March 1822, recorded their opinion to the following effect:

The fact of the execution of the deed under which the respondent claims is not established to the satisfaction of the Court: and according to the allegation of the defendant, it was executed by Bahoo Surub Jeet Sing without her knowledge or consent. Admitting it however to have been established by sufficient proof, still there remains a question as to the legality of its provisions. It appears that both parties were of the Moohummudan persuasion; now it has been proved by a formal exposition of the law as delivered by the Moulwees of this Court on a former occasion (a), a copy of which has been filed with the proceedings agreeably to the order of the Court, as well as from the tenor of the *futwa* of

(a) The case here alluded to originated in the year 1816, in the district of Furruckabad. A girl had been purchased when an infant from her parents by a prostitute, and having been educated in the courses, and for a long time followed the disreputable practices of her mistress, she at length attracted the special notice of Hadee Yar Khan, a most respectable person, who agreed to marry her in the event of her relinquishing her unlawful occupation. This she consented to do, and having left the house of her mistress, proceeded to that of the individual above named. The prostitute who had purchased her, and who of course dreaded considerable loss of profit from her departure, petitioned the magistrate of Furruckabad to compel her return, with which request that officer, from a mistaken notion of duty, complied. An appeal having been preferred from the above order, the opinions of the best authorities in that quarter were taken as to the validity or otherwise of the prostitute's claim, and the same question having been propounded to the law officers of the Sudder Dewanny Adawlut, they all unanimously declared that it rested on no legal foundation whatever, that a child purchased in its infancy was at full liberty when of mature age to act as best suited its inclination, and that it was even a duty incumbent on the magistrate to punish any attempt at compelling adherence to an immoral course of life.—For further information on this subject see *Principles and Precedents of Moohummudan Law*, article "Slavery."

the said Moulvees on the present occasion, that, unless Chutroo was the lawful slave of Jussa, she (Jussa) had no right to exercise any control over her, or to cause her to do any act contrary to her wishes and inclination. The Magistrate, of the Foujdarry Court would have had no power to cause Chutroo to be given to her mistress Jussa, had the case not been compromised. In this case there is no proof that Chutroo was the legal slave of Jussa. It is merely set forth by the plaintiff, that she had educated the defendant from her childhood; and it is a well known fact, that in Benares many children are annually stolen and sold to the persons who profess dancing and singing; besides, it is equally notorious that those people obtain much of their livelihood by the practice of prostitution. It is incumbent on the judicial authorities to abstain, without the fullest proof of free will, from countenancing the servitude of any individual entitled to freedom; and in the present case, in the absence of any such proof, an order of a compulsory nature would have been clearly illegal. Even if the execution of the deed were proved to have been by the consent of the girl, it was nevertheless a nude pact, and a contract which did not promise her any equivalent; in other words, an undertaking to pay a sum of money in consideration of being exempted from a control to which the contracting party was not legally subject; or, as the alternative, to return to a state of servitude, which the law, in her case, did not recognize. Such an undertaking then as this is utterly illegal, and unworthy of support. The respondent has not attempted to prove that she has not been fully reimbursed for whatever she might have expended, by the sum of 760 rupees, received by her from the appellant, and by the profits of her pupil during the time she remained with her; nor does it seem at all likely that what she received in this manner was less than her expences for education. It is but equitable, to consider her receipts equal to her disbursements on the above account. It is obvious, moreover, that if the appellant absconded with any ornaments or articles of dress belonging to the respondent, the latter is at liberty to bring an action for them; but that has nothing to do with the present case. With respect to the alleged customs of the dancers, on which the *vakeels* of the respondent lay considerable stress, it is sufficient to say that such customs are in opposition to the law, and unworthy of being judicially recognized from their manifest tyranny and injustice.

Accordingly the decree of the Provincial Court was reversed, and judgment was given in favour of the appellant. The costs were made payable by the respective parties.

1822.

Mussum-
maut Chu-
troo, v.
Mussum-
maut Jussa.

1822.

OOMAN DUT, (Pauper), Appellant,
versus

April 15th.

KUNHIA SINGH, Respondent.

According to the Hindoo law, while a brother's son exists, the adoption of any other individual as a son either in the *Duttaka* or *Critrima* form of adoption, is illegal.

THIS was an action brought in the Zillah Court of Tirhoot on the 21st of December 1809, by the present appellant against the present respondent, to recover possession of a half share of mouzas Ram Chunderpoor and Rihwa, the annual produce of which was estimated at 701 rupees. It was set forth in the plaint, that Goolab Singh, maternal grandfather of the plaintiff, having no son, did on the 5th of *Magh* 1207, F. S., adopt and choose the plaintiff as his son, and by deed constituted him proprietor of half the above mouzas, and of other property; and afterwards died in the month of *Chey*t of the same year, when the plaintiff, having performed all the duties incumbent on a son at the death of his father, entered on possession of the estate, and up to the year 1208, F. S., enjoyed the profits of the said mouzas. In the year 1209, on account of the management of the lands being assumed by Government, he received the proprietary deeds from the Collector of the district; and in the year 1210, F. S., at the time of the general settlement, by reason of the plaintiff being a minor, the name of his father Prem Singh was entered on the books of the Collector, and the rents up to the year 1215, F. S., were paid through the said Prem Singh, in conjunction with the defendant, who was proprietor of the other half of the estate, as would be proved by the accounts, which, for the years 1210 and 1214, were in the hands of the plaintiff, those for the other three years being with the defendant.

In the year 1216, F. S., the defendant wrongfully ousted the plaintiff from the property, on account of which he brought the present action. The defendant in reply, after generally denying the claim, stated that Prem Singh had no share in the property in dispute: that he, the defendant, had no knowledge of the adoption spoken of by the plaintiff; that, admitting it to have taken place, such adoption of the plaintiff, who was the grown up son of Prem Singh, was repugnant to the Shasters, and utterly unlawful; that if the adoption had actually and lawfully been made, his not being of age was no hindrance to his name being entered on the Collector's books; that the widow of Goolab Singh had from the time of her husband's death up to the year 1208, F. S., received the income of the estate; that the allegation of the plaintiff having had possession had not the shadow of truth; that Purdeep Singh, the son of Gundrup Singh, who was the full nephew of Goolab Singh, was the rightful claimant to his property by the law of inheritance; that the name of Prem Singh, who never had any claim to the property, had been fraudulently introduced into the Collector's books; and lastly, that the deeds of gift alleged to have been executed by the deceased Goolab, had been obtained by fraudulent means during the illness and aberration of intellect of the said deceased, and that they were therefore invalid by regulation 11, 1793.

In this stage of the proceedings Sheo Singh and Rughoo Singh preferred a claim to a share of the property in dispute, on the plea

1832,

Ooman
Dut, v.
Kunhia
Singh.

that they also were nephews of Goolab Singh deceased, and were his heirs equally with the other nephews. In passing judgment in this case, on the 6th of May 1813, the Zillah Judge was of opinion that, from the evidence, it was proved that Goolab adopted the plaintiff at a time when he was ill, but in his right senses, and executed a deed of gift of his half share in his favour; also that Prem Singh had possession of the said property from the year 1210 to the year 1215, F. S.; he conceived it necessary, however, to ascertain the opinion of the law officer as to the legality or otherwise of the transaction; whether, if a Brahmin was to adopt his grandson, the grown up son of his son-in-law, with the knowledge of only one nephew, and if that adopted son should perform the funeral obsequies of his adopting father, such adoption would be legal or not? also, if the same person at that time, and while there are surviving nephews and grandsons of his brothers, who are living separately, should execute a deed of gift of his property in favour of the said grandson, to the exclusion of all the nephews, and should have his (the grandson's) name entered in such deed of gift, the transaction would be lawful or not? The pundits replied in the negative in both instances; and consequently a decree was passed dismissing the suit with costs. On appeal to the Provincial Court of Patna, the pundit of that Court declared that the adoption and gift were legal; but the law officer of the City Court, who was also consulted, answered, that although the adoption was legal, and the gift also, as to personals, landed property could in no case be alienated without the consent of the family; and both law officers agreed, that without such consent, the gift or sale of joint property was invalid. It being thus obvious that the appellant could not maintain a claim to joint property, and no proof appearing that any division had taken place between Gundurp and Goolab Singh, the Second Judge (J. R. Elphinstone) passed an order on the 20th of January 1816, confirming the previous decision, with full costs. The present appellant petitioned for the admission of a special appeal to this Court, *in forma pauperis*, and with a view to ascertain the propriety or otherwise of admitting it, the pundits were questioned on the following points: Two full brothers being in possession of joint property, one of them having no son, did, during his life time, adopt his daughter's son, and executed a deed giving the joint property into the hands of such adopted son; afterwards, on the death of the grandfather, can such adopted son, according to the Hindoo law, as current in Mithila, possess his grandfather's share of the joint property by virtue of the adoption, or by virtue of the deed of gift?

Answer.—If one of two full brothers, who hold their property in common, having no lineal descendants, adopt, by the *Kritrima* form, his own daughter's son, and execute a deed of gift of his proper share in the common property to that person, the latter, after the death of his adopting father, is entitled to such share in right of his adoption as *Kritrima* son, though not in right of the deed of gift; inasmuch as, the shares not being defined, a single parcener is not competent to give, sell, or otherwise alienate even his own share. This exposition of the law is in conformity with the *Vivada Ratnakara*, *Vivada Chintamani*, *Vivada Chandrika*, and other books current in the territory of Mithila.

1822.

Ooman
Dutt, v.
Kunhia
Singh.

'AUTHORITIES I.—This text of *Yojnyawalcya* on the subject of the ' twelve sorts of sons, or the legitimate son, one procreated on the lawful wedded wife, &c. (a), cited in the *Vivada Chintamani*. ' Among these the next in order is heir, and presents funeral oblations on failure of the preceding.' (b)

II.—The words of *Boudhayana* on the same subject, " The legitimate son, the son of an appointed daughter, &c." quoted in the *Vivada Chintamani*, and *Vivada Rutnakara*, ' and ' *Vivada Chandrika*. " All these in succession are declared heirs to a man who has no legitimate son."

III.—This sentence of the *Devaita Parisishta*, " Where a separation of shares has not taken place, that property is common, here is then a common right, where one partner has not the power of gift, sale, &c."

A second question was put to the pundits distinctly, as to whether a grandson by the mother's side could be adopted as a son according to the law as current in Mithila? and they replied that he could, as evinced by the following texts:

I.—*Vivada Chintamani*. " *Kritrima* is the ninth, he willing to be affiliated by a childless man, desirous of a son, becomes by offer and consent the son of his adopter."

II.—*Menu*, on the same subject, quoted and interpreted in the *Vivada Rutnakara*. " He is considered as a son made or adopted, whom a man takes as his own son, the boy being equal in class, endowed with filial qualities, and acquainted with the merit of performing obsequies to his adoptive parents, and the sin of omitting them. (c)

III.—*Boudhayana*, cited in the same work, and explained there and in the *Smriti Sara*. " One of the same class, desirous of being received in adoption, whom a person with free will may affiliate, is the *Kritrima* son." (d)

A special appeal was in consequence admitted, agreeably to orders passed on the 19th of July and 1st of August of the same year. On the 2d of July 1820, the case came to a hearing before the Third Judge (S. T. Goad), who observed that there was no satisfactory proof either of the execution of the deed of gift, or of the due celebration of the adoption in public; and that the appellant, by the account of his own witnesses, was ten years old at the time; but that letting this pass, he being the eldest son of his natural father, the adoption under any circumstances was invalid, as appeared from Mr. Colebrooke's translation of the *Mitakshara*, p. 310.

" So an only son must not be given (nor accepted), for *Visishta* ordains, ' let no man give or accept an only son.' Nor though a numerous progeny exist should an eldest son be given, for he chiefly fulfils the duty of a son."

But as Ooman Dutt was acknowledged on all sides to be Goolab Singh's daughter's son, he (Mr. Goad) judged it right to question

(a) Vide Colebrooke's Translation of the *Mitakshara*, p. 301.

(b) Vide, *Ibid*, p. 314.

(c) *Menu*, IX, v. 169.

(d) This and the preceding are given in the original as four distinct quotations, but on reference to the *Ratnakara* the whole are found to be contained in the same page, see p. 154 of the Manuscript in the College of Fort William.

the law officers as to any claim he might have, as such, on his grandfather's estate; it being understood that Goolab Singh had left a widow and nephews. A further interrogatory was added as to the legality of adopting an eldest son. 1822.

Ooman
Dut, v.
Kunbia
Singh.

The first question was answered in the negative, on the ground that as the widow had no claim in such a case, the property having been held in common, the daughter and the daughter's son could have none either.

I.—The *Balarupa*: the text of *Yajnyawalkya* (e), "the wife, the daughter, &c. (succeed a man leaving no male issue)," refers to one separated from his coheirs who has not again coalesced with them. (f)

Answer II.—The eldest son, if made the *Kritrima* son of another, would legally become so. Because the legality of a man's adopting his own father, or his eldest brother, as *Kritrima* son, in conformity with the texts of *Menu*, cited underneath, being established by immemorial usage, communicated by a succession of righteous men, just as is the legality of the said form of adoption by the same local usage, notwithstanding the general prohibition in 'this' the *Kali* age of any representative, other than a legitimate son (*Aurasa*) and a son given (*Dattaka*); there can be no legal objection to the adoption of any other eldest son, for the aforesaid usage is decisive among the people of that country; and although the adoption of an eldest or of an only son is prohibited in the *Mitakshara*, there is no such restriction in any of the works already mentioned, nor in the *Vivada Chandrika* and other books followed in Tirhoot.

AUTHORITIES:—*Menu*, "He who has no son must be careful to adopt one of some kind or other; for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name." (g)

II.—The same legislator quoted in the *Vivada Ratnakara*. (See No. II. of the last *Vyuvustha*.)

III.—The *Pitamaha Sanhita*, or, 'Code of *Brahma*.' "The custom of the country must be inquired into, that which may be the established law of each country is to be done, wise men do not practise what is odious to mankind, hence one skilled in the law should follow the way of the world."

After perusal of the above, the Third Judge, on the 7th of August 1820, inquired, firstly, whether, according to the same school of law, a boy of ten years could be adopted in the *Kritrima* form? and secondly, what forms were essential to the validity of that description of adoption? and on what authority the pundits stated the customs of Tirhoot?

It was answered; a boy of ten years can become a *Kritrima* son, because there is no restriction of age with regard to such form of adoption in the Tirhoot authorities already mentioned.

(e) *Yajnyawalkya*, c. II, 22, 23.

(f) This doctrine is the same as that contained in the *Mitakshara*. See Colbrooke's Translation, ch. II, sec. 1, particularly the conclusion in p. 340.

(g) This verse is not in the Code. It is however cited as from *Menu* in many books, and amongst others in the *Dattaka Mimamsa*. The after part of the translation is that given by Mr. Sutherland, in p. 3 of his work.

1822.

Ooman
Dut, v.
Kunhia
Singh.

and the *Kritrima* form of adoption prevails as approved by the people of that country, without regard to the legal distinctions of the *Dattaka* form excluding an only son, an eldest son, one of more than a certain age, one initiated (in tonsure and other ceremonies) in his own family, and therefore incapable of being initiated by the person adopting, and one precluded by reason of his mother's affinity to that person. In conformity with the text of *Menu* already cited, comprehending the words "of some kind or other" implying no distinction other than that of the person to be adopted as *Kritrima* son possessing the requisite similarity of class.

The prescribed form of invitation for a person desirous of adopting a *Kritrima* son, after making some present to the person willing to become his adopted son, is this, "Be thou my son." And the form of consent for the latter is this, "I am become so." The consent of both parties to the transaction is indispensable; all the rest being a mere customary form, the omission of which would by no means invalidate it. Nor is a child of ten years incapable of consenting to become a son when so called upon; because, provision being made in the *Veda* for the recital by a child of seven or eight years at the time of *investiture*, of a text engaging to follow certain rules inculcated by his spiritual guide, which would not have been done were he incapable of doing so, it follows, *a fortiori*, that a boy of ten years is capable of understanding this sentence, "I am become your son." While a postponement till the sixteenth year, notwithstanding the capability of practising prescribed duties, and avoiding forbidden acts, as in worldly dealings, would be contrary to revealed law and to the code, both which direct the celebration of *initiation* originating the right of practising every duty sacred and legal in the eighth year from conception or in the eighth year after birth.

AUTHORITIES I.—The *Vivada Chintamani*, as quoted in page 146, is here repeated.

II.—*Suddhi Viveka*, "The manner of it 'the *Kritrima* adoption' at an auspicious time, the adopter having bathed and having given the boy some acceptable present, should say, "Be thou my son;" he should answer, "I am become your son." The offer of a present is a customary form, though not indispensable. The agreement of both parties to the adoption is indispensable."

It was added that, in pursuance of the text of *Brahma* (h) it was incumbent upon the pundits to make research into the customs of every country, and that the pundits of this Court in particular having to expound the law of the whole country, had occasion for a knowledge as well of the approved usages of every province as of the law books there current, both being essential to a discrimination of the law, and that the practice of the *Kritrima* adoption in the Tirhoot district was notorious, and had been by them ascertained from the law tracts there followed, and from respectable natives of the country.

Directions were subsequently issued to the Judge of Tirhoot to take such evidence as might be adduced by the parties on the

question, whether it was the usage of the country to adopt an eldest son in the *Kritrima* form? whether a boy of ten years could become a *Kritrima* son or not? and what were the law books there followed? 1822.

Ooman
Dut, v.
Kunbia
Singh.

Understanding from Mr. Sutherland's translation of the *Dattaka Mimansa* and *Dattaka Chandrika*, that no child can be legally adopted whose mother's relationship to the adoptive father precludes marriage; Messrs. Goad and Dorin, on the 21st of September 1821, called upon the pundits for an explanation, as to how a daughter's son could be adopted as *Kritrima* son, and for any texts which might specifically authorize such adoption.

On the 27th of November was read the following answer: The rule is not applicable to the case of the *Kritrima* son of *Mithila*, as it is contradicted by this notice of the legality of adopting a father or a brother as *Kritrima* son, by *Kesaba Misra*, a pundit of the country. "When a father, a brother, or the like has been adopted as a son, the invocation to the adopter at solemn obsequies is by his new relation of father, not by that of son or brother" for the impossibility of a man's marriage with his father's mother, or his mother's mother is known to all mankind.

At this stage of the proceedings, the Third and Officiating Judges (S. T. Goad and W. Dorin) agreed as to the propriety of calling in the aid of the Second Judge (C. Smith), with reference to the nice point of *Mithila* law under consideration; the decision of which would in all probability become a precedent for similar cases.

The Second Judge gave his judgment on the 19th of December 1821, as follows: I consider the execution by Goolab Singh of the deed of gift and *Kritrima* adoption, bearing date the 7th Magh 1207, F. S., as satisfactorily proved, Goolab Singh's *Malikana* was evidently distinct from that of Gundurp Singh, and the rest of the family, while Surubjeet Singh held the lands in farm from Government, and his lease did not terminate till after the execution of that deed. It is also clear, that after Goolab Singh's death, the name of Prem Singh, natural father to the plaintiff, was recorded in the Collector's books, and that he enjoyed for many years the share of the deceased Goolab Singh; all which could have been in no other right than as guardian and manager on behalf of his son under the above deed. It is further apparent, that the respondent for eight or nine years after Goolab Singh's death made no opposition, as if admitting the validity of the deed; and that he eventually obtained possession of the property by violence. It has not been shewn by the answers of the pundits of this Court, that the adoption of the appellant in the *Kritrima* form was illegal, either by reason of his having been ten years of age, or because he was Goolab's daughter's son, or because he was the eldest son of his natural father; and although some assertions to the contrary appear in the evidence taken down before this Court, and in the Zillah Court, by order of the Third Judge, with a view to ascertain the usage of the country; no good ground has been furnished for setting aside the exposition of the law given by our officers. I am therefore of opinion that the appellant is entitled to the property claimed by him, and that the decree of the lower Courts should be reversed.

1822.

Ooman
Dut, v.
Kunhia
Singh.

On the 31st of the same month, in the presence of the Officiating Judge, the respondent's pleader disputed the correctness of the *Vyuvusthas*, and maintaining that an adoption of the present nature was expressly forbidden by authorities current in Mithila, produced a Sanskrit paper, purporting that texts of *Sakala* and *Saunaka* to this effect were contained in the compilations, which went by their names in the *Dattaka Chandrika*; *Putra Karana* or *Dattaka Mimansa*, the *Vyavahara Madhava*, and *Vyavahara Mayukha*, and were borne out by the concurrent authorities of *Menu*, *Vasishtha*, *Vrihaspati*, *Gautama*, *Yajnyawalkya*, *Atri*, and every other divine legislator. That *Sakala* for instance, declares, "Hence a childless twice born man may adopt as his son the offspring of a *Sapinda* or else of a *Sagotra*; in default of the latter he may bring up one of a different stock, other than his daughter's son, sister's son, and mother's sister's son." And *Saunaka*, "The selection of *Kshatriyas* likewise must be from amongst their own tribe, or else an equal tribe of the same sect, that of *Vaisyas* from amongst the tribes of *Vaisyas*, that of *Sudras* from amongst the tribes of *Sudras*; of all the castes in their own tribes and not elsewhere; but by *Sudras*, the daughter's son and sister's son are affiliated."

The law officers were therefore again called upon, and required to state whether the above works, which were understood to interdict the adoption of a grandson by the daughter in the *Kritrima* form (i) were current in Mithila or not; together with the reasons of the received practice in either case.

Answer.—The codes of the sages *Saunaka* and *Sakala* form part of the sacred law, *Smriti*. The *Dattaka Chandrika*, written by the author of the *Smriti Chandrika* (k) is a Carnatic work. The *Putra Karana Mimansa* was the work of *Nanda Pandita* of Benares. The *Vyavahara Madhava* by the commentator on the *Veda*, (*Madhava Acharya*) is current in the Talingara territory. The *Vyavahara Mayukha* was composed by *Nīlakantha Bhatta*.

The four last works are not current in Mithila, for there is no occasion for them, the affairs of that country being decided by the *Rutnakara* and other native tracts, but the works of *Saunaka* and *Sakala*, in which there is a text forbidding the adoption of a daughter's son, being founded on the *Veda*, as established by the sacred character of the compilers, are authority in every country, and decisive of the law, and are current even in Mithila; in conformity with this rule, "that which is not controverted is allowed," for the text in question has not been oppugned in the *Rutnakara* and other books of that province. Still, however, *Kesava Misra* (l), one pundit of that country, not respecting it, has mentioned the adoption of a father or brother.

The above was read on the 22nd of January 1822, before the

(i) The text of *Sakala* quoted runs thus; *Putrative Parikalpayet*, should adopt as a son; that of *Saunaka* thus, *Kriyata Suta* is made a son or affiliated. But in the Persian translation furnished by the respondent's pleader, the words *پوترم* occur several times, as taken from the original, which contains no such expression.

(k) *Devanda Bhatta*.

(l) Author of the *Dwaita Paristakha*.

Third Judge, who remarked, that it was clearly laid down in the *Dattaka Mimansa* and *Dattaka Chandrika*, that no person can affiliate a grandson by the daughter; which general rule shewed the illegality of the adoption of the appellant by his maternal grandfather Goolab Singh, either as a *Kritrima*, or as a *Dattaka* son. Mr. Goad, therefore, with reference to his view of the case, as recorded in July 1821, differed in *toto* from the Second Judge, and recommended that the appellant's claim should be dismissed.

By Mr. Dorin, the sitting Judge, on the 23d of the same month, the pundits were asked, whether an individual who had a brother's son living could in Tirhoot legally adopt as *Kritrima* son, his daughter's son or any person? and an answer was filed on the 7th of February, that such adoption would not be lawful, the adoption of a *Kritrima* or any other sort of son, when a brother's son existed, being forbidden by the authors of the *Kalpataara* and *Parijata*, and other old writers of that country, and likewise by the modern writers, *Chandeswara*, *Vachaspati Misra*, *Bansadara*, *Rudradhara*, *Harinatha*, and others; that it was therefore not valid by approved usage, as no such usage could exist in opposition to every law tract of the country, ancient and modern, nor be of any weight if it did exist.

I.—The *Ratnakara*: “By the incomparable *Medhatithi*.” After citing both the divine legislators (m), “If among several brothers of the whole blood, one have a son born, *Menu* pronounces them all fathers of a male child by means of that son; and *Vrihaspati*, “If there be many brothers by the same father and mother, and one of them have a son born to him, they are all declared to be fathers of a male child; the same law obtains among many wives of the same man, if one of them have a son he presents the funeral cake to all.” It is observed, that men having nephews, and women whose husbands have sons by another wife, may not appoint representatives, such as the son of the wife, &c. the *Parijata* says the same, as does also *Vidayakara* in his commentary on *Menu*.”

II.—*Vachaspati Misra* in the *Dwaita Nirṇaya*, after giving the same texts. “The object of this fiction of parentage being to save men from the hell called *Put*, and to entitle women to share in the funeral cake, neither may make a *Kritrima* or other adoption.”

III.—The same writer in the *Sradha Chintamani*. “The incomparable ‘*Medhatithi*,’ *Udayakara*, the *Kalpataara*, the *Ratnakara*, &c. all hold in like manner that men having nephews, and women, whose husbands have sons by another wife, are not to adopt *Kritrima* or other representatives.”

IV.—*Bansadara*, in the *Suddhi Nirṇaya*, *Rudradhara* in the *Suddhi Viveka*, and *Harinatha* in the *Smṛiti Sara*, and *Smṛiti Samuchhaya* maintain the same.

The Officiating Judge, on the 15th of April, remarking that this conclusion against the validity of the adoption was confirmed by the *Dattaka Chandrika*, and *Dattaka Mimansa*, in which it is stated, that in default of a son the nephew has a right to be adopted to the exclusion of all others, and noticing that the deed of gift, not having been proved, was out of the question, declared his full

1822.

Ooman
Dut, v.
Kunhia
Singh.

concurrence with the Third Judge as to the propriety of rejecting the claim.

It was accordingly ordered that the decrees of the lower Courts should be affirmed.

1822.

MIRZA QAIM ALI BEG, Appellant,

versus

April 15th.

MUSSUMMAUT HINGUN and others, Respondents.

According to the Moolum-mudan law continual cohabitation and acknowledgment of parentage form sufficient presumptive evidence of wedlock and legitimacy; and the heirs being two widows, a mother and a son, the property should be made into 48 parts, of which the widows are entitled to 6, the mother to 8, and the son to 34.

THE appellant with Gholam Yacoob were plaintiffs in an action brought in *forma pauperis*, against Mussummaut Hingun, Mussummaut Tajun, Fuzzul Ali, Jumal Ali, and Iqbal Ali, on the 19th of March 1811, in the Provincial Court of Benares, to recover two shares of certain lands situated in Bahadurpoor, commonly called Shujaabad, in the pergunna of Rohulpoor, together with two shares of an enclosed building and a brick tenement, the threefold value of which was 7,015 rupees.

In this case it was stated by the plaintiffs, that the property in question had originally belonged to Shuja Beg Khan, and, according to a duly authenticated deed of partition, had been for some time divided into three shares, two of which had been assigned to Qasim Ali Beg, father of the plaintiff, Qaim Ali Beg, and one to Meer Fuzzul Ali and others, heirs of Meer Qoorhan Ali.

The father of the plaintiff dying, left as his legal heirs, the plaintiff, aged 11 months, and his wife Mussummaut Khoosh Halee, the plaintiff's mother, another wife Mussummaut Tajun, also his own mother Mussummaut Khoorsheed Khanum. One of the widows, namely Mussummaut Tajun, considering both shares as merely equivalent to her marriage settlement, brought an action claiming them, against Mussummaut Khoorsheed, the paternal grandmother of the plaintiff, in the City Court of Benares.

This suit was compromised, and an order was passed recommending the parties to come to a private adjustment. The plaintiff's grandmother remained in possession of both shares, and mortgaged them for the payment of the costs of suit, and Tajun agreed to relinquish her claim in consideration of receiving the sum of thirty rupees *per annum* for subsistence. The estate was subsequently mortgaged to one Hingun Beebee for the sum of two thousand five hundred rupees, and after a short time the husband of the said Hingun, with a view to getting possession of the property, fraudulently instigated Tajun to bring an action for both shares against Khoorsheed and Hingun his wife.

Some time after Khoorsheed died, and this action also was compromised by Tajun's filing a *razeenama* at the instigation of the husband of Hingun, stating that she had consented to the sale of one share, and to the mortgage of the other, by her mother-in-law (Khoorsheed) on receiving 250 rupees from Hingun, the mortgagee, and on this *razeenama* a decision was passed accordingly. The plaintiffs on hearing this, brought an action against Hingun Beebee in the City Court of Benares for the restoration of the property. Further, the plaintiffs declared that Tajun had never

been in possession of the property from the time of the death of Mirza Qasim Beg; that the will of Khoorsheed Khanum directed, that after clearing off the mortgage, Qaim Ali and Ghoolam Yacoub her grandsons, should divide the property between them. It was moreover set forth by the plaintiffs, that Meer Fuzzul Ali and his coparceners, proprietors of one of the shares of the property, persuaded Hingun Beebee to declare that she had sold one share to them, and had induced Tajun to declare that she had sold the other share to them also. Through these fraudulent and collusive practices the plaintiffs had, as they stated, been ousted from the estate to which they were unquestionably entitled. In a subsequent amended plaint, the names of Niamut Ali and Syud Nussur Oollah Khan were included in the number of defendants; it being shewn that the former was one of the purchasers of the land in dispute, and the latter the mortgagee of the same. The defence set up in this case by Hingun Beebee was, that Khoorsheed Khanum had mortgaged to her two shares of the property for the sum of 2,500 rupees without interest, and had given her possession of the said shares; that afterwards Khoorsheed received from her a further sum of 250 rupees, on which she sold to her one share for the whole sum lent, namely 2,750 rupees, and delivered over to her (the defendant) a deed of sale which was signed by the *Kazee*. Subsequently to this, Tajun, the widow of Qasim Ali, brought an action against her and others for the sake of disproving the authenticity of the said deed of sale, in which case she filed a *razeenamah*, and withdrew her action on the death of Khoorsheed, in consideration of the receipt of 250 rupees from the defendant, admitted the validity of the sale, and made over to her (Hingun) a deed of mortgage of the remaining share for the sum of 1,200 rupees. The defendant then sold the share she had bought of Khoorsheed to Iqbal Ali, Jumal Ali, Himmud Ali and others, for the same sum as she had given for it, according to the deed of sale, and gave up the remaining share, which was mortgaged, on receiving repayment of the sum lent; consequently that she was not responsible for the claim; and that though the plaintiffs have stated that Tajun relinquished all demands on the property; yet such relinquishment having been fraudulently obtained, it could not avail them. Meer Fuzzul Ali, another of the defendants, in his defence, denied altogether having any concern, whether of selling or buying, in the transaction. Meer Jumal Ali, and Meer Iqbal Ali, admitted that they had purchased one share from Hingun Beebee, which share had been sold to her by Khoorsheed Khanum by the consent of Tajun, and that the other share was purchased by them from Tajun herself. Besides, that Tajun was the lawful wife of the deceased Mirza, and after the death of the mother-in-law (Khoorsheed) became the sole heir to the property left by Qasim, while the mother of Qaim Ali was neither the wife nor the slave of Qasim Beg; and that Qaim Ali himself being a posthumous child, no one could declare that they heard the said Qasim claim him as his son. Further, that Yacoub, the other plaintiff, was not the grandson of Khoorsheed on her daughter's side, for Khoorsheed never had any offspring excepting Qaim Beg, and that consequently neither of the plaintiffs could have any

1822/
Mirza
Qaim Ali
Beg. v.
Museum-
maut Hin-
gun and
others.

1322.

Mirza
Qaim Ali
Beg, v.
Mussum-
maut Han-
gun and
others.

legal claim to the inheritance. The reply of Niamut Ali was similar in purport. The plaintiffs rejoined by stating that Khoorshood never had possession of the shares in dispute, and that the sale or mortgage during the minority of the actual proprietors could not be legal.

The defendants, Tajun and Nussur Oolla, suffered judgment to go by default. On the 11th of July 1818, the Second Judge of the above Court dismissed the suit of the plaintiffs with costs on these grounds:

It appeared to him from the evidence of both parties, that the marriage of Qasim Beg with Khoorshalee, the mother of Qaim Ali, was not sufficiently established, and although one or two of the plaintiff's witnesses had deposed to hearing Qasim Beg claim Qaim Ali as his son, yet, according to the *futwa* of the law officers of the Court, it appeared that a woman not being married to the person with whom she cohabits, the child thereby produced cannot inherit the property of the father, even if he should have acknowledged the parentage. If the plaintiff's mother had been lawfully married to Qasim Beg, and had a legal claim to the inheritance, she would not have remained silent, and withheld her claim from the commencement of the first action brought by Tajun for her marriage settlement till the time of the sale of the land in question to Iqbal Ali and the rest. In this view, therefore, of the case, the claim of Qaim had no foundation in law, and it being proved also that the mother of Yacoob was merely an *élève* of Khoorshood Khanum, and had by her been given away in marriage, in which wedlock Yacoob was born, his claim was also groundless. The plaintiff Qaim, not content with this decision, preferred an appeal to this Court, *in forma pauperis*, for the recovery of the lands, estimating their value at 8,118 rupees, the profits of 18 years, the property being rent free.

The law officers of the Sudder Dewanny Adawlut having been consulted on the same point as that referred to the Mooftee of the Provincial Court, they delivered a *futwa* directly contrary to that given in the Court below, reciting that, If a woman was free and not married to any other man, although the actual celebration of her marriage may not have been proved with the man with whom she cohabited; yet if he declared the son of such woman to be his, that son will certainly be accounted his legitimate offspring, and should the mother of the child also confirm this declaration, she will be considered, to all intents and purposes, the lawful wife of the person so declaring. And both, that is to say, the woman and her son, will be heirs of the reputed and acknowledging father. Some of the plaintiff's witnesses had deposed, that Qaim Beg was the son of the deceased Qasim, that Mussummaut Khoorshalee was a free woman, that at the time of his birth at the house of Qasim presents were distributed and entertainments given, as usual on the birth of a son, and that Qasim had frequently spoken of Qaim Ali as his son. Under these circumstances, although the actual celebration of the marriage of the parties was not legally proved; yet, following the law as expounded by their law officers, it was the opinion of the Chief and Officiating Judges (W. Leicester and W. Dorin) that there was abundant presumptive evidence of the wed-

lock of the parties, and that Khooshalee should be considered the legal widow and heir of Qasim. 1824.

The law officers of the Court were next desired to state, what would be the legal distribution of the deceased's property, he having died leaving, as heirs, Mussummaut Khoorshed his mother, a wife Mussummaut Tajun, another wife Mussummaut Khooshalee, mother of Qaim Ali, and Qaim Ali his son; and since, Khoorshed had first died, and after her, Khooshalee, to whom would their shares devolve? Mirza Qaim Ali Beg, v. Mussummaut Hingun and others.

On the 15th of April the case came to a final hearing before the Judges above named, who recorded their judgment in these terms: It appears that the appellant was plaintiff in an action brought for the estate of Qasim Beg, who died in the year 1213 F. S., consisting of two shares of the mouza of Buhaderpoor, commonly called Shujaabad, in the pergunnah of Rahulpoor, and two shares of an enclosed building and brick tenement in the said mouza. Of the defendants, Jumal Ali and Iqbal Ali, the present occupiers, claim both shares by virtue of deeds executed by Khoorshed and Tajun, namely, one share by virtue of a deed executed by Khoorshed in favour of Mussummaut Hingun, and a subsequent deed executed by the said Hingun in favour of the defendants, and the other share by virtue of a deed by Tajun herself direct to them; and rested their defence on two points, first, that Qasim Beg left no property to his heirs, the whole having fallen to Tajun as her's by marriage settlement, and secondly, that the appellant was not the lawful-begotten son of Qasim Beg. From all the evidence exhibited in this case, it appears that the two shares in dispute which were left by Qasim Beg, should legally descend to his heirs in the due course of inheritance; no sufficient proof having been adduced to establish the claim of Tajun by virtue of her marriage settlement. It has, on the other hand, been sufficiently proved, that the appellant is the legitimate son of Qasim Beg, and, according to the *fatwa* of the law officers of this Court, the property should be made into forty-eight parts, forty-five of which belong to the appellant, and three to Tajun, according to the following statement:

Qasim Beg died leaving Tajun and Khooshalee his widows, Khoorshed his mother, and Qaim Ali his son. His property being divided into forty-eight parts, one-eighth, or six parts, falls to the wives in equal shares, one-sixth, or eight parts, to the mother, and the remaining thirty-four shares to the son. And on the death of Khoorshed and Khooshalee, their shares, amounting in the whole to eleven, become also the property of Qaim; therefore the appellant is entitled on the whole to forty-five shares. With respect to the eight shares of the property, however, left by the death of Khoorshed, he should not be allowed to take possession thereof, unless he undertake to pay whatever debts may be proved to be due from that portion of the estate. As far as regards the thirty-seven shares to which the appellant and his mother were entitled, no deed or proof of sale by or to any other person can affect the right of the appellant.

The decree therefore of the Provincial Court was reversed, and immediate possession of thirty-seven out of forty-eight shares of the property claimed, with ultimate possession also of the eight shares

above alluded to, on his undertaking to be responsible for all incumbrances which might attach to that portion. (a)

1822.

MULLICK AHMUD KHAN, Appellant,

versus

June 11th.

PUDUM SINGH and others, Respondents.

A sale having been made by a debtor to his surety, and set aside as having been extorted by violence, the Court will nevertheless compel the debtor to pay to his surety the amount (principal and interest) which had been borrowed on the credit of the surety, declaring at the same time that the latter should be responsible to the original creditor.

THIS was an action brought by the present appellant, on the 15th of December 1817, against the respondents in the Zillah Court of Bareilly, to obtain the insertion of his name in the Collector's books as proprietor of the zemindaree of Lallpoor and Antooria, comprising 15 mouzas, belonging to the talook of Koonwur, pergunnah Seena.

It was stated in the plaint, that the defendants had in the month of *Showal* 1228, A. H., sold the above property to the plaintiff for 525 rupees, as by the bill of sale; that the money was paid and received, with an agreement that the property was to remain in the plaintiff's possession, as farmer, for the space of five years, namely, from 1220 to 1224, F. S., inclusive, after which it was to become absolutely sold; and accordingly the plaintiff had been in possession of it from the date specified, and had paid the government revenue, and that after the expiration of the stated time, notwithstanding the agreement entered into and the importunity of the plaintiff, the defendants did nothing but procrastinate, from day to day, the transfer of names in the Collector's books.

The defendants, after denying the alleged conditional sale, replied that their names, together with that of Beer Sah, were inserted in the Collector's books; and that they, being nearly fifty persons, were joint proprietors of the zemindaree in question, and that consequently the alleged deed of sale bearing the signature of three only, out of the fifty, was not valid; that had the alleged deed been in existence, the plaintiff might easily, when ousted from the possession of the property in the year 1224, F. S., have produced it before the Collector, or have brought an action for possession under it; that the defendants were not in such need of money as to have sold the property for such a sum as was

(a) The decision in this case rested on a well known principle of Moohumudan law, that a marriage may be proved by something short of ocular proof, such as continual cohabitation, notoriety, hearsay or circumstantial evidence, and that the acknowledgment of offspring is sufficient to establish parentage, provided there be nothing to repel the presumption. See *Principles and Precedents of Moohumudan Law*, page 300, *et passim*. The distribution of shares took place agreeably to the third principle. The share of a mother, where there is a child, being one-sixth, (see *Ibid*, page 6, §§ 33) and the share of a widow, where there is a child, being one-eighth, (*Ibid*, p. 3, §§ 14) the property should in the first instance have been made into twenty-four parts (*Ibid*, p. 13, §§ 66) but the eighth of twenty-four, or three, cannot be divided between the two wives without a fraction; when the rule is, that the number of sharers who cannot get their portions without a fraction, being prime to the number of the sharers ($2=3-1$) the former number should be multiplied into the number of the original division $24 \times 2=48$ (*Ibid*, p. 15, §§ 77.)

alleged. The facts of the case were, they alleged, as follow; 1822.
 the plaintiff, on account of being surety for the defendants, had taken possession of fifteen of the hundred and sixty-four mouzas, which formed their hereditary zemindarée, from which mouzas, after paying the government revenue, a yearly profit of 1,100 rupees was netted, and the defendants having become defaulters, and being in confinement on account of 525 rupees arrears of Government revenue, were at midnight forced by the agent of the plaintiff to execute the deed set up by him; but they had in their possession the agreement to cancel such deed of sale, which had been subsequently executed by the plaintiff. On the 14th of August 1818, the cause came to a hearing before the First Register of Zillah Bareilly, and the deed of sale executed by the defendants was proved by the evidence of the plaintiff's witnesses, but the subsequent agreement, and the force used by the agent of the plaintiff towards the defendants to procure the execution of the said deed, were likewise proved by the witnesses of the defendants, as also the joint possession of the property in dispute, by several persons besides the defendants and Beer Sah. The suit was therefore dismissed, and the costs made payable by the plaintiff.

Mullick
 Ahmud
 Khan, v.
 Podum
 Singh and
 others.

The plaintiff then appealed to the Provincial Court of Bareilly, and on the 26th of June 1819, the decree of the Register's Court was affirmed by the Second and Fourth Judges of that Court with costs.

On a further appeal to the Sudder Dewanny Adawlut, the case came first to a hearing before the Second Judge (C. Smith), and it appeared, in his judgment, proved that the claim was invalid, and that violence had been used in procuring the execution of the deed of sale. It was proved, besides, that the appellant was habitually violent and tyrannical, as were also his agents; but it was established, also, that the defendants were indebted to the plaintiff in the sum of 525 rupees, of which justice demanded that payment should be caused. Nothing, however, had been awarded in either of the Courts below, and it was necessary therefore that their decrees should be amended, which was ordered accordingly, the respondents being directed to pay over to the appellant the sum of 525 rupees principal, and the same sum as interest, total 1,050 rupees. The costs in all three suits were made payable by the parties respectively.

The case was next brought before the Third and Officiating Judges (S. T. Goad and W. Dorin) on the 11th of June 1822, after having been postponed for further consideration. These Judges also expressed themselves of opinion that the evidence proved the violence used respecting the deed of sale, and that the agreement entered into by the agent of the appellant was established, though denied by him; that therefore, if there was any doubt as to the first deed being drawn out with the consent of the respondents, none could remain respecting the agreement; that although the appellant denied the execution of the agreement by his authority, yet it was the act of his agent while in that capacity, and if the deed of sale should be considered valid, the agreement to cancel it should be considered so too. That as to the receipt of the loan by the

1822.

Mullick
Ahmad
Khan, v.
Pudum
Singh and
others.

defendants, it was sufficiently clear from the evidence adduced by themselves, that they had borrowed of two *Mahajuns* the sum of 525 rupees, on the security of the plaintiff, and that although it was not completely proved that, by virtue of being surety, the responsibility of the debt had fallen on the appellant, yet it was not established in evidence, that the defendants had paid the debt as they stated, or that the debt had been discharged at all. If the debt had not been discharged, the Court observed it was necessary at the present time to enforce it; and if the appellant by the payment of the debt to the *Mahajuns* had become their creditor, he was entitled not only to the principal, but to the interest also, from the time of his being turned out of possession of the property in dispute, but that during the time he was in possession, the profits of the property should be reckoned as interest. Therefore, considering all the points of the case, especially the circumstance that the loan was obtained by the respondents from the *Mahajuns*, by means of the appellant, it appeared just that the appellant should be paid the sum with interest from the time specified above, by the respondents, as being the representative of the *Mahajuns*; and that he should be considered responsible to the *Mahajuns* for the said debt. If the appellant should make it appear that any interest was due to him for the time during which he was in possession, he should give in an account of the same. The opinion therefore of the Court corresponded with that of the Second Judge, except with respect to the interest to be awarded. The decree of the Zillah and of the Provincial Courts was accordingly affirmed, with this addition, that the appellant should receive the amount of the debt, namely 525 rupees, and interest on that sum from the time he gave up possession of the mouzas, namely, the year 1225 F. S. And it was further ordered, that the appellant should be responsible for any claim on account of the debt which might hereafter be brought by the *Mahajuns*; and that if the appellant could make it appear that any thing else was due to him for the time during which he was in possession, he was at liberty to sue to that effect.

SADHOO LALL and others, Appellants,

1822.

versus

NABEMA BEEBEE and INAYUT AHMUD, Respondents. June 18th.

THE respondents, on the 13th of April 1816, brought an action against Sadhoo Lall and Birjuttua mortgagees, and Sheikh Chiragh Ali one of the mortgagors, in the Provincial Court of Benares, *in forma pauperis*, to obtain restoration of half a share of a talook which went by the name of Chowdry Mochummud Ismail, which had been mortgaged, and the triennial assessment on which amounted to the sum of 4,150 rupees; also to recover the sum of 6,257 rupees for profits unduly appropriated. It was stated in the plaint, that the talook in question was the hereditary property of the plaintiffs, and Chiragh Ali, Ahmud Ali, and Ahmud Oollah; one moiety belonging to the plaintiffs; that the female plaintiff's husband, and Chiragh Ali, had in the year 1209 F. S. made over the said talook to the other defendants for five years, in consideration of a loan of the sum of 5,501 rupees on a mortgage of the nature termed *Dristha Bundhuka*; that is, where the mortgagee, though in possession, does not enjoy the profits arising therefrom; that the interest of the loan was paid at two rupees *per cent* per month, with two *per cent* for wear and tear of rupees, and one *per cent* commission, also 25 rupees for *Gomashtas* wages, besides the pay of *Sebundies*; that in the year 1212 F. S., before the expiration of the five years agreed upon, the principal and interest, including the above demands, were found to have accumulated to the sum of 10,001 rupees, upon which Naesema's husband was forced to enter into an agreement of *Bhog Bundhuka* (a regular mortgage wherein the mortgagee enjoys the profits) for the liquidation of the above sum for the space of five years longer; that the mortgagees had collected the sum of 11,586 rupees annually from the said talook, and having paid the Government revenue amounting to 8,301 rupees, and 460 rupees as *nankar* to the mortgagors, netted annually the sum of 2,825 rupees up to the year 1216 F. S. But the receipt of interest by the said mortgagees was, after the years 1212-13, F. S., illegal, and contrary to the provisions of regulation 17, 1806; that in 1217, after the expiration of the time specified, namely, five years, the mortgagees taking advantage of the death of the female plaintiff's husband, the necessary retirement of herself, and the youth of her son Inayut Ahmud, did, in concert with Chiragh Ali aforesaid, cause to be executed an acknowledgment which confirmed the former mortgage for the period of ten years from the beginning of the year 1218 F. S.; in which the names of the plaintiffs were included, without their knowledge; that from that date up to 1222 F. S., a space of five years, the sum of 70,524 rupees had been realized from the property, of which the sum of 49,806 rupees was paid as Government revenue, and 1,555 as *nankar* to the mortgagors; the remainder, namely 19,163 rupees, having been appropriated by the mortgagees, with the connivance and concert of Chiragh Ali; that although by these means the original sum, with interest, had been paid, and a balance remained in favour of the plaintiffs, yet the mortgagees would neither render an account of their dealings respecting

Where a mortgage of an entire talook has been executed by its several proprietors in one and the same transaction, an action by one of the proprietors for the redemption of his own particular share only will not lie.

1822.

Sadhoo
Lall and
others, v.
Naema
Beebee and
Inayht,
Ahmed.

their share, nor restore possession of the share itself, and that they had moreover since taken a mortgage of the whole property for a longer term, with the connivance of the said Chiragh Ali, in which the names of the plaintiffs were entered without their consent or knowledge.

The defendants, Sadhoo Lall and Birjuttun, stated in their reply, that the claim to recover the talooks, without paying the sum lent or the other specified sums, the payment of which was agreed upon as the condition of redeeming the mortgage, was untenable. That the other partners in the property had not come forward as joint plaintiffs, and that therefore the suit was contrary to rule; that with respect to what had been said of a balance remaining due to the plaintiffs, it was contrary to the contents and conditions of the deeds of mortgage executed by the mortgagors of the property and by the plaintiffs themselves, and was devoid of the slightest foundation; that when the predecessor of the plaintiffs and Chiragh Ali had settled the account of the mortgage in the year 1212 F. S., they, having received another sum of money, executed and delivered to the same persons another deed of mortgage, after the manner of *Bhog Bundhuk*, in exchange for the sum of 10,501 rupees, of which the following were the conditions: that on the payment of 300 rupees to the mortgagors, and the due discharge of the Government revenue, whatever might be further obtained from the estate by the management of the parties holding it, should belong to them; further, if the sums borrowed were not repaid by the specified time, the property was to devolve upon the holders of the mortgage; and as the said mortgage deed had been executed previously to the promulgation of regulation 17, 1806, its validity could not be affected by the provisions of that enactment.

Chiragh Ali in his reply, declared that as the mortgagees had been in possession of the talook since the year 1209 F. S., and he (Chiragh Ali) was, as appeared from the statement of the plaintiffs, one of the mortgagors, this suit, which was to recover the mortgaged property from the hands of the holders of it, could not attach to him, and that what had been advanced by the plaintiffs as to the acknowledgment of the year 1217 F. S. having been without their knowledge and agreement, was utterly false and unfounded; for the plaintiffs had, agreeably to that acknowledgment, regularly received *nankar*, and given receipts of the same. Besides the money received on the mortgage, they had received several sums, after the acknowledgment had been some time in existence, and had given their notes of hand for the same, in which the name of the defendant had been included; from these circumstances it was plain that there had been no ignorance of the said acknowledgment on the part of the plaintiffs; and as to the second acknowledgment, of which an evasion had been attempted, the state of the case was this; it was written with the consent of the plaintiffs and of the defendant Chiragh Ali, and after the said defendant had signed and sealed the same, and the attestation of three or four persons had been annexed to it, the plaintiffs refused to sign it, and brought the present action founded on their fraudulent non-agreement to the proceeding.

When the case came to a hearing before the First Judge of the Court of Appeal, on the 24th of May 1820, it appeared that the mortgage deed of the nature termed *Bhog Bundhuk* was dated the 6th of August 1804, A. D., which was antecedent to the promulgation of regulation 17, 1806, that the mortgage was conditioned to endure for five years, and that the mortgagees were to receive all the profits of the estate, excepting what was to be paid as *nankar*, in lieu of interest on the money lent. The Judge therefore was of opinion, that the moiety of the mortgaged property should be redeemed, and that 10,501 rupees, was all that could be claimed by the mortgagees, being the principal sum lent, the claim to any excess being founded on the execution of an acknowledgment of a date subsequent to the enactment above quoted, and that it was incumbent on the plaintiffs, if their own share of *nankar* could not be realized from the mortgagees, or from Chiragh Ali, to bring their action against him who detained it. It was ordered, therefore, that the plaintiffs, from the beginning of the year 1228 F. S., should obtain possession of one moiety of the talook in dispute, and that the plaintiffs should pay to the mortgagees the sum of 705 rupees on account of such half share which appeared from the accounts to be then due to them.

1822.

Sadboo
Lall and
others, v.
Naema
Beebee and
Inayut
Ahmed.

The defendants, on this decision, appealed to the Court of Sudder Dewanny Adawlut, and the case came on to a hearing before the Third and Officiating Judges (S. T. Goad and W. Dorin). It appeared on investigation that the first mortgage of the talook in question was in the manner of a *Drishtka Bundhuka* on a loan of 5,501 rupees, and that it was dated in the year 1209 F. S., as was admitted by the respondents: also, that the mortgage deed contained stipulations respecting interest, &c. which are repugnant to the regulations at present in force, and that similar objections existed to the acknowledgments subsequently executed; but with respect to the former deed, dated in 1209 F. S., and the subsequent mortgage deed conferring a tenure of *Bhog Bundhuk*, the objection alluded to could not apply, the mortgage deeds having been executed previously to the date on which regulation 15, 1793, was extended to Banares, and they were therefore certainly valid: because the stipulations contained in them relative both to principal and interest, payable by the mortgagees, were not opposed to any law then in existence, and because it was conditioned in that deed that the profits of the land mortgaged should be enjoyed by the mortgagees in lieu of interest up to the year 1216 F. S. Under these circumstances there did not appear to be any legal objections to those mortgages, but so much could not be said of the acknowledgment subsequently executed; any illegality of the stipulation contained in which would undoubtedly affect the transaction, the acknowledgment having been executed subsequently to the year 1214 F. S., the time mentioned in the 6th section of regulation 17, 1806. It became necessary to enquire therefore whether the mortgage was actually redeemed agreeably to the said regulation or not? If the yearly profits were less than the interest at the rate of 12 per cent per annum on the debt, the mortgage could not be redeemed without payment of all the sums, principal and interest: if, on the other hand, the yearly receipts

1822.

Sadho
Lall and
others, v
Naenia
Beebee and
Inayat
Ahmed.

exceeded the interest, then the yearly surplus should go towards the payment of the principal. The Court were, however, of opinion that, setting aside altogether the merits of the case, no judgment ought, in regularity, to have been passed upon the claim, inasmuch as it should have been brought for the whole, and not for the moiety of the mortgaged talook, the mortgage of both shares having been effected in one and the same transaction. The decree of the Provincial Court was therefore reversed, the respondents being nonsuited, on account of the irregular nature of their claim, and they were declared at liberty to bring an action for the redemption of the whole talook, even if one of the mortgagors should refrain from joining in the suit; as they might, on obtaining judgment, take possession of the whole, leaving the other mortgagor, who was not a party to the suit, to obtain his share on preferring the requisite application, and on paying his full proportion of all the expences. Costs in both suits were made payable by the respondents.

1822.

July 24th.

TUBEED SHAH, Appellant,

versus

BUDDER OODEEN, Respondent.

In a claim preferred after the period prescribed by the regulations it is not requisite to declare that the adverse possession was acquired by fraud or violence, if that can be gathered from the plaint; and a plea of insanity set up by the plaintiff, not having been investigated, a review of judgment was allowed by the Sudder Dewanny Adawlut, and the case sent back for a new trial.

THIS action was originally instituted on the 4th of January 1811, by the appellant, against the respondent, in the Zillah Court of the twenty-four pergunnahs, to recover seventeen beegahs of assessed land in mouza Peepra, pergunnah Moondagacha, one year's rent of which was 22 rupees; also to recover the sum of 510 rupees; on account of the produce for 18 years, which had been unduly appropriated.

The plaint set forth, that of the lands in question, fifteen beegahs were held and cultivated by the plaintiff's grandfather on a *Jungulbooree* tenure, and two were held by and in the name of the plaintiff originally; that in the Bengal year 1199, the plaintiff was seized with illness which terminated in insanity, and he then appointed four individuals by name Sheikh Maunoollah, Sheikh Byjoo, Sheikh Qasim and Sheikh Hashim as his agents, with injunctions to pay the rents punctually, and to support the family of the plaintiff with the profits; that the defendant, who had been nominated surety by the individuals above named, seeing the estate of the plaintiff's mind, had contrived to seize the lands and to appropriate the profits; and that no sooner had the plaintiff recovered a little from his malady, than the defendant openly ejected him and his agents. The defendant replied by denying every particular of the plaint. He stated that the plaintiff was never insane, that he had never appointed the four individuals specified as his agents, and that he himself had never become surety; that the truth of the matter was, that the lands in question were held by the plaintiff's father, who, not being able to pay the rents, sold his tenure in the Bengal year 1199 B. S., to the defendant, for the sum of 24 rupees, and that the plaintiff's grandfather and uncle were also parties to the sale: that he had regularly discharged the rents, and that he had receipts and other vouchers to prove his

uninterrupted possession, though the deed of sale under which he acquired the tenure had been destroyed by fire; that there were living witnesses to prove its having been duly executed: and lastly, that his title and possession had existed for a period of upwards of eighteen years. On the 2d of March 1812, the Zillah Judge with advertence to the circumstances of the case, and especially to the length of time which had elapsed before the claim was preferred, recorded his opinion that the suit was frivolous and vexatious, and dismissed it accordingly; sentencing the plaintiff at the same time to three months imprisonment as temerously litigant. On appeal to the Provincial Court, this judgment was affirmed, on the 29th of November 1815, by the Fourth Judge, who recorded his opinion that no sufficient cause had been shown by the appellant for the delay in preferring his claim. A special appeal from the above decision was admitted by the Court of Sudder Dewanny Adawlut, but on an investigation of the case it was dismissed on the 6th of June 1818, by the Fourth and Officiating Judges (W. E. Rees and G. Oswald) they being of opinion that in the case of a claim being preferred after the period prescribed by the regulations, it was necessary under the second and third sections of regulation 2, 1805, for the claimant to state distinctly and specifically in his plaint, the precise nature of the fraud or violence by which possession of the property in dispute had been acquired by the adverse party, which in this instance had been omitted. A review of judgment was subsequently prayed for by the appellant, on the grounds that as the respondent was merely a surety, and had no right or title to the lands claimed, it was self-evident that his possession had been dishonestly and unjustly acquired, and consequently that a specific allegation to this effect was mere surpluage; that the plea of purchase set up by the respondent was absurd, as a tenure of the nature of that under which the lands claimed were held was not a fit subject of sale by the tenant, and that there was nothing in the provisions of sections 2 and 3, regulation 2, 1805, which could be construed to preclude an investigation into the question of right. These pleas being deemed sufficient by the Second Judge (C. Smith) he recorded his opinion on the 15th of December 1821, that the judgment should be reviewed. He observed that the plea of insanity set up by the claimant to account for the delay that had intervened had not been investigated in either of the Courts below, and that the only way to remedy this error was to grant the relief prayed for by the appellant. Being joined in this opinion by the Third Judge (S. T. Goad) the cause came to a hearing before them both on the 24th of July 1822, when they recorded their decision to the following effect: Although the claimant did not distinctly and specifically state in his plaint that the possession of the adverse party was acquired by fraud or violence, yet that this was his meaning may clearly be gathered from the whole tenor of his declaration. Setting aside the provisions of regulation 2, 1805, it is provided in the 14th section of regulation 3, 1793, that civil causes shall not be heard if the cause of action may have arisen above twelve years previously to the institution of the suit; but it is at the same time provided, that this rule shall have effect only in the absence of any sufficient cause,

1822.

Tubeeb
Shah, v.
Budder
Oodeen.

1822

Tubeeh
Shah, v.
Budder
Oodeen.

such as minority or insanity to justify the delay, and that if such cause shall be found to have existed, the claim may be tried on its merits, notwithstanding the lapse of time; that in the present instance no enquiry whatever had been made into the truth or otherwise of the allegation of the plaintiff as to his insanity, and consequently that it still remained to be ascertained whether or not the suit was of such a nature as required investigation on the merits. For these reasons it was decreed that this suit should be returned to the Judge of the 24 Pe gunnabs, through the Calcutta Court of Appeal, with directions to investigate the plea of insanity set up by the appellant, and in the event of its being established, to enter fully into the case, and to pass a decision on its merits. The costs in all three Courts were made payable by the parties.

1822.

Aug. 12th.

RAJAH DEEDAR HOOSEIN, Appellant,

versus

RANEE ZOOHOORUNNISA, Respondent.

In a suit in which both parties are *Sheeas*, the Court will decide agreeably to the doctrines of that sect; and, according to the law of inheritance prevailing among them, a brother is entirely excluded by a daughter.

RAJAH Fukhr Oodeen Hoosein, who died in the year 1200 B. S., was father of Deedar Hoosein and of Akbur Hoosein, the deceased husband of Zoohoorunnisa. At his death both his sons were in their minority, and the estate was managed for their joint interests by the Court of Wards, their guardianship being entrusted to certain female relations who received allowances from the proceeds of the estate. No formal division appears to have taken place after they attained the age of majority. In the year 1221 B. S., Akbur Hoosein died; but a short time before his death he was alleged to have executed a deed of gift, and subsequently a deed of sale to his wife Zoohoorunnisa, conveying to her, in lieu of dower, the moiety of pergunnah Soorjapoor and other pergunnahs situated in the district, which had devolved jointly on him and his brother. The documents abovementioned having been duly attested by a Cazeer, and the usual number of witnesses, they were recorded in the registry book by the Register of the district, and the name of Zoohoorunnisa was entered by the Collector as joint proprietor of the estate, in virtue thereof; and in spite of the remonstrances of Deedar Hoosein, who, having no other resource, brought an action in the Provincial Court of Moorshedabad, on the 31st of January 1815, to recover the moiety so transferred, stating the triennial jumma at 346,201 rupees.

The chief objections urged against the transfer were that the appellant's brother was of unsound mind, occasioned by a long continued course of illness, at the time the documents which had been brought forward as conveying the right to his widow were executed; and, that, admitting no such objection to have existed, the deceased was not competent to make such disposition of his property, the immemorial usage of the family having been, that the surviving male heir should succeed to the entire estate, to the exclusion of females and other branches of the family; to which effect the late Fukhr Oodeen Hoosein had left a will, and the late Akbur Hoo-

sein had signed an agreement. Other minor pleas were adduced. 1822.
None of them were of material importance to the case but those cited, and the answer was principally confined to a denial of those allegations. It was contended, moreover, that the usage set up by the plaintiff was illegal, by the provisions of regulation 11, 1793. Rajah Deedar Hoosein, v. Ranees Zoohoorunnisa.

The Senior Judge of the Moorsheadabad Court of Appeal dismissed the claim, and awarded one half of the estate to the defendant. He did not doubt the validity and authenticity of the documents under which Zoohoorunnisa maintained her claim, as it appeared that Deedar Hoosein, among all the remonstrances urged by him to the Register and the Collector, had never hinted a doubt as to the sanity of his deceased brother; and as it appeared, from the opinion of the law officer, that even admitting the deceased Akbur Hoosein to have signed an agreement to the effect that the surviving male heir should succeed to the entire estate, such agreement could be considered only in the light of a will, which a testator is at liberty to retract, and to make any other disposition of his property.

An appeal having been preferred from the above judgment to the Court of Sudder Dewanny Adawlut, the Fourth Judge (S. T. Goad) differed in opinion from the Court below. He conceived that there was no satisfactory proof of the due execution of the documents under which Zoohoorunnisa claimed, as the original deed of dower on which they purported to have been founded was not forthcoming, and the allegation of the respondent, that it had been taken violently from her by the appellant not being entitled to credit, never having been advanced in any former stage of the proceedings. He, however, concurred in thinking that the plea of usage set up by the appellant was not sufficiently proved to warrant his succession to the entire estate, and he gave his opinion that the moiety left by the deceased Akbur Hoosein should be parcelled out among all his heirs agreeably to the Moohummudun law of inheritance. It became necessary, on account of the above difference of opinion, that the appeal should be brought before another Judge. The Officiating Judge (Courtney Smith), before whom the appeal was next brought, concurred in the opinion expressed by the Fourth Judge, that the documents under which the respondent claimed were not authentic. He differed with him, however, as to the usage set up by the appellant. This usage he held to have existed for centuries, and he cited two instances, which were proved to have occurred in this family, of the zemindaree devolving on the son-in-law of the deceased proprietor, to the exclusion of all other claimants; he (the deceased proprietor) having died without male issue. It further appeared that the respondent's late husband had himself admitted in a former suit the immemorial existence of this usage, a usage the infringement of which, the Officiating Judge observed, would have effectually prevented those extensive possessions from descending entire through so many generations. On this ground he considered the appellant entitled to the whole of the estate, without reference to the alleged will of his father and agreement of his brother, the proof or disproof of which he was of opinion could not affect the merits of the case. He concluded by stating, that regula-

1822. tion 11, 1793, was irrelevant, as the death of Fukhr Oodén Hoosein occurred in the commencement of that year, and as the regulation quoted was intended to bar the succession by primogeniture, but not to declare illegal an usage which prevented the succession of females, and the alienation of lands to satisfy claims of dower, against which the appellant contended.

Rajah Deedar Hoosein, v. Raneé Zoohoorunnissa.

The Chief Judge (Sir James Edward Colebrooke), to whom the case was ultimately submitted, after animadverting on the precipitancy evinced by the Register and Collector of the district, in having given effect to a disposition alleged to have been made by the late Akbur Hoosein, without personally summoning that individual with a view to the ascertainment of the truth, (as was obviously their duty in a case involving property so considerable, to the transfer of which objections were urged by a third party,) recorded his opinion that the plea of usage urged by the appellant was duly established, and that the documents under which the respondent claimed were not authentic. He accordingly concurred with the Officiating Judge in reversing the decree of the Moorsheadabad Provincial Court, and in awarding sole possession of the estate of Soorjapoor, &c. to the appellant, subject to the condition of his providing due maintenance for the respondent, who was directed to pay all the costs of suit, and to refund all the mesne profits realized during the period of her possession. The respondent, however, was still dissatisfied with the decision; and some time after petitioned the Court to review their judgment, setting forth the following grounds: According to the genealogical table produced by Deedar Hoosein, on which he founds his claim of exclusive right, it would appear that the estate has immemorially devolved entire on the elder branch of the family; whereas it is clear and admitted that he is a younger brother, and consequently on the death of his elder brother, Akbur Hoosein, the estate should, according to his own showing, have devolved on the heirs of the latter individual. This genealogical table has not been proved to be genuine, but admitting its authenticity, it contains nothing to justify the exclusion of widows from their right of dower. As a moiety of the estate descended to Akbur Hoosein by the law of inheritance, he was clearly entitled to appropriate it to the payment of his just debts. For these and other reasons, after hearing the objections urged by the vakeels of Deedar Hoosein, the petition for a review was admitted, and the Chief Judge (W. Leycester) recorded his opinion on the 21st of January 1822, to the following effect: The custom of the family pleaded by Deedar Hoosein has not been satisfactorily established, and even if established, it would be contrary to law, and prohibited by regulation 11, 1793. It has been objected, on the part of Deedar Hoosein, that in no less than eleven cases decided by this Court, the operation of the enactment in question has been suspended; but on investigation it will appear that there existed reasons in those cases which do not apply in the present instance. In one case, the decision was passed before the enactment above cited. In another case the parties were Hindoos, and the decision was passed agreeably to the *shasters* and to the will of their ancestors. In another case the dispute was between the heir of a deceased Hindoo and a person who claimed the inhe-

ritance by adoption, without reference to any family custom. • In 1822. another case the defendant had got possession of the litigated property long before the enactment of regulation 11, 1793, which has a prospective but not a retrospective effect. In another case the estate in dispute was situated in the mountainous parts of Midnapoor, to which regulation 11, 1793, has by regulation 10, 1800, been expressly declared inapplicable. The other six cases relate to questions of dower, and are rather in favour of the widow who now claims than against her. Admitting, however, for the sake of agreement, that the custom alleged by Deedar Hoosein did actually exist previously to the death of Fukhr Oodeen Hoosein, it clearly ceased to exist subsequently to that event; for it is admitted that his two sons shared the profits. As for the argument that the integrity of the property will be violated by its being permitted to descend according to the law of inheritance, it is obvious that this consequence must equally ensue by allowing more than one heir to participate in the profits; and supposing Akbur Hoosein and Deedar Hoosein each to have had a number of sons, they would all doubtless have had a right to share in the profits, after the manner which their respective fathers had adopted before them. Deedar Hoosein himself quietly enjoyed one moiety of the estate, which is a clear proof of the non-existence of any such custom as that which he pleads. The will alleged to have been executed by Fukhr Oodeen is evidently not genuine, and admitting it to be so, it should not be permitted to operate to the detriment of the other lawful heirs; and admitting the authenticity of the alleged agreement to the effect that the surviving male heir should succeed to the entire estate, still no effect can be given to such agreement, it being repugnant to the provisions of the regulation above quoted. There is no necessity, however, for ascertaining the authenticity or otherwise of these documents, as they were sufficiently disproved when the cause was on a former occasion brought to a hearing before the Court of Sudder Dewanny Adawlut. The Chief Judge concluded by recording his opinion that the former decree of this Court, dated the 4th of August 1821, should be overruled, and that the moiety of the estate left by Akbur Hoosein should be distributed among his heirs, after ascertaining the number and degrees of whom, he proposed to send the case to the law officers of the Court for an exposition of the law of inheritance applicable to it. The cause having next come before the Third Judge (S. T. Goad), he concurred in every particular in the judgment recorded by the Chief Judge, such having been his view of the case when it was formerly decided by this Court; but his opinion was then overruled by the voices of two other Judges. Under these circumstances, it was deemed requisite to submit the case to the Officiating Judge (W. Dorin), who had joined in admitting the desired review. On the 7th of May, the Officiating Judges, after recapitulating the whole of the proceedings and evidence in the case, and expressing his concurrence generally in the opinion expressed by the Chief Judge, observed that, according to the Moohammudan law, there was another weighty objection to the validity of the will alleged to have been executed by Fukhr Oodeen, which objection was, that according to the law in ques-

Rajah Deedar Hoosein, v. Ranees Zoonhoorunnisa.

1822. tion, no testamentary disposition would avail for more than a third of the testator's property. He was of opinion that one moiety of the *semindaree* of Soorjapoor should be assumed to have been the estate of Akbur Hoosein, the deceased husband of Zoonoorunnisa, and that, although Deedar Hoosein had laid claim to the entire property, he nevertheless would have been held entitled to such portion as he might be declared entitled to by the law of inheritance. He proceeded to state, however, that as it was admitted by both parties that the family of the litigants were *Sheea* sectaries, and that agreeably to the tenets of that sect, a brother is not entitled to any portion of the property of a person deceased who leaves a daughter, Deedar Hoosein should not be admitted to participate at all in the moiety left by Akbur Hoosein, it appearing that that individual had left two daughters. This doctrine was established by the exposition of the law delivered in the case of Wujihonnisa Khanum and others, *versus* Mirza Husun Ali (b). The papers in the case having been resubmitted to the Chief and Third Judges, with reference to the modification of their opinion as suggested by the Officiating Judge, it was urged on behalf of Deedar Hoosein, that the legal doctrine held by the *Sheea* sectaries was never resorted to in practice; and that all questions of civil controversy involving a reference to the law of inheritance, were invariably decided agreeably to the tenets of the *Soonees*. These objections were, however, overruled, on the authority of the precedent cited by the Officiating Judge, and on the ground of the admission by Deedar Hoosein that he was not entitled to any share according to the law of inheritance as current among the *Sheeas*. The Chief and Third Judges, on the 12th of August 1822, passed a final decree, concurring with the Officiating Judge, and rejecting the claim of Deedar Hoosein to any participation in the moiety of the estate left by his brother Akbur Hoosein, observing that their judgment would have been to that effect in the first instance, had the fact of the parties being of the *Sheea* persuasion been sufficiently adverted to.

(b) *Vide* page 266, vol. I.

MUSSUM MAUT RAM SONA, (Mother and Guardian of RAM SONA) 1822.

KOOMAR MOTEE LOLL, Son of SUMBHOO CHUNDER MOTEE

LOLL, Appellant,

Aug. 27th.

versus

Mr. GEORGE CHESTER, (Commercial Resident at Maldah),
Respondent.

THIS was an action brought by the Commercial Resident of Maldah, in the Moorshedabad Provincial Court, on the 22d of January 1818, against Rughoonath Chowdree, Obhychurn Bhutacharuj and Ram Kishwur Chowdree, and their respective sureties, to recover the sum of 10,000 rupees alleged in the plaint to have been embezzled by them in the following manner: The defendant, Rughoonath, who was Dewan to the Maldah commercial establishment, in the month of September 1816, debited the subordinate factory at Nattore, in the Maldah cash account, for a remittance of 20,000 rupees, out of which, as appeared on subsequent investigation, only 10,000 rupees were actually sent to Nattore, the balance being embezzled by the Dewan with the connivance of the defendants, Obhychurn and Ram Kishwur, who were *Gomashtah* and Treasurer of the Nattore factory, and who gave him credit in their accounts for the whole sum. In proof of which the *Gomashtah's* deposition when the Dewan was brought before the Magistrate went to shew that he and the Treasurer, on the strength of a written request from Rughoonath, credited him for the whole sum, although they had only received one half. It was stated in conclusion, that the Dewan had owned that he only sent the sum of 10,000 rupees; and that this suit was instituted by order of the Board of Trade, on his failing to make up the deficiency due to Government.

The defendant, Rughoonath Chowdree, after denying that he had embezzled the money, or written as stated to the *Nattore Gomashtah*, pleaded, that he had filled the situation of Dewan to the Maldah Residency with unimpeached credit for the period of eleven years; that the plaintiff, on being appointed Acting Resident in the year 1811, employed him (the defendant) as usual to superintend the business, until he was confirmed in the situation, when he entrusted to his private servant (Ram Mohun Sheikdar) the duties of the Factory, and the power of removing the officers of the Residency and of the outstations; and also employed that person at his own discretion in superintending the business; that the Resident's charge against him could be entitled to no weight, as the whole of the money was under charge of the Treasurer, and at the command of his private servant Ram Mohun, the Treasurer keeping one key of the treasure chest, and the plaintiff the other; while whatever money came in was deposited there sometimes by the plaintiff in person, and sometimes by the said Ram Mohun, and whatever payments became requisite, were by the plaintiff's directions, after the bill had received his signature, taken from the treasury and delivered to the *Jemadar* by Ram Mohun and the Treasurer, after which the *Mohurrirs* brought the same to credit in the cash account, under the plaintiff's orders; so that he (the defendant) had no influence or concern at all in the pecuniary

1822. transactions of the Residency; that the plaintiff had already by complaint to the Magistrate procured his (the defendant's) commitment on the same charge; the sum then stated to have been embezzled being 13,000 rupees, but that the Fourth Judge, who presided at the session, was not satisfied with the evidence nor with his written confession, which appeared to that Gentleman to have been extorted by undue means, and that the Judges of the Nizamut Adawlut, on reference to them, pursuant to the *futwa* of their law officers, had declared the above document unworthy of credit, and had ordered his (the defendant's) release; and that the present suit was consequently inadmissible under the 16th section of regulation 3, 1793. The defendant in continuation, argued on the extreme improbability that the Nattore *Gomashtah* should have brought the money to account on the strength of a letter from him, when he was totally without influence at the Residency, and, indeed, labouring under his master's displeasure. Finally, he stated that the facts of the case were, that when the Company gave up the saltpetre monopoly, Mr. Chester took that business, with its outstanding balances upon his own hands; and that Ram Mohun Sheikdar, by his orders, in September 1816, made the *Mohurrirs* place the sum of 22,100 rupees (which was the amount due to Government for those balances) to credit on the books in one item, under the denomination of silk advances to the Nattore, Nauthpore, and Jellalpore Factories, and prepared the monthly accounts accordingly, which the plaintiff signed and sent in to the Board; so that he was justly responsible for that sum, and had indeed paid part of it off by instalments. He finally submitted, that in the case of the Nattore Factory being debited in the books of the Commercial Residency for 20,000 rupees, when that sum had once been placed to account in the Nattore books, the *Gomashtah* of that factory was alone responsible, and ought either to account for its expenditure, or refund; and not the servants of the superior factory.

The defendant, Obhychurn Bhuttacharuj, set forth in his answer, that the plaintiff and his Dewan, in September 1816, sent to him at Nattore the sum of 10,000 rupees under a guard of Sepoys; that the cashkeeper there, Ram Kishwur Chowdree, took charge of this money, and put it down in the monthly accounts, which he sent in after they had been signed by him, by the present defendant, and by the Mohurrir Ram Rai; that these accounts were however returned, accompanied by two letters in the Dewan's own handwriting, one to the cashkeeper, and one to himself, purporting that 10,000 rupees had been debited to their factory in September, more than had been actually sent, and directing them to place that sum to credit as usual, and make up the monthly accounts in correspondence thereto, and that they sent in the accounts amended according to these directions; that afterwards, when he (the defendant) found that the Dewan neither sent the money in question, nor gave any answer to his repeated applications by letter on the subject, he informed Mr. Chester of the circumstance, and the Dewan upon being questioned by that Gentleman, entered into a verbal and written acknowledgment of his having embezzled it himself. This defendant further argued that, as it was clear, both

Mussum-
maut Ram
Sonn, v.
Mr. George
Chester.

from the plaintiff's statement, and from the first defendant's answer that the sum now sued for had never been received by him, at Nattore; indeed that no such remittance had ever taken place except on paper in the Commercial Resident's accounts, the present action must consequently fail as far as he was concerned. Kishen Serma Mujmoadar, whom the plaintiff had placed among the defendants, as being one of the Dewan's sureties, gave in an answer, denying that such was the fact, or that he had any connection with the present cause.

1822.

Mussum-
maut Ram-
Sona, v.
Mr. George
Chester.

One Sumbhoo Chunder Motee Loll, residing at Jyenuggur, pergunnah Bureidhauttee, was also sued by the Commercial Resident as a surety of the Nattore *Gomashtah*, and on proclamation being made by the Acting Judge of the 24 pergunnahs, a person of that name transmitted through the Judge a petition to the Provincial Court, stating that there were two other people of the same name as himself in mouza Jyenuggur; one of them, son of Kewul Ram Motee Loll; the other, son of Ram Dutt Motee Loll; adding that he had never been concerned in any transactions at Maldah, or given security for any one; and that he was ignorant whether either of the other two persons of the same name had done so or not. The other defendants did not appear.

This cause came to a hearing on the 14th of February 1820, before the First Judge of the Provincial Court; who, after premising that the plea set up by Obhychurn Bhattacharuj in excuse for giving the Maldah Residency credit in his accounts for 20,000 rupees, when he had actually received only half that sum; namely, that he did so on the strength of a written request from the Dewan, was illegal, and altogether inadmissible in a court of justice; and noticing that the acknowledgment entered into by Rughoonath Chowdree was upon unstamped paper, and had been extorted by the plaintiff from him through coercion, as established by the sentences of the Court of Circuit and Nizamut Adawlut, and that it further by no means appeared that he (the Dewan) had actually embezzled the money, passed an order releasing the latter from all responsibility, and making the whole of the plaintiff's claim payable by Obhychurn and his sureties; as well as all costs, with the exception of those of Rughoonath Chowdree, for which the plaintiff was made liable.

Sumbhoo Chunder Motee Loll appealed to this Court, and dying soon after, his widow prosecuted the appeal. The cause was taken up on the 19th of March 1822, by the Second Judge of the Sudder Dewanny Adawlut. (C. Smith), who, (after having perused the papers of the case, and examined an original document filed by the Government Pleader on behalf of the respondent, purporting to be a security bond entered into by Sumbhoo Chunder Motee Loll, in conjunction with another defendant, Rajib Lochun, which document had been attested by Mr. Wynch, one of the assistants in this office, on the 8th of September 1814, at the application of two persons representing themselves to be Sumbhoo Chunder and Rajib Lochun) found occasion to remark upon the indefinite nature of the final order passed by the Provincial Court against Obhychurn and his sureties, without having investigated which was the identical Sumbhoo Chunder mentioned in the security bond.

1822. which point was only to be ascertained by examining the two witnesses whose names were subscribed to that document. It further appearing from a decree of the Rajeshaye Zillah Court, dated the 31st of January 1820, which had been filed by the appellant's Vakeel, that Shristee Dhur Kybert, one of the above witnesses, had died previously to a *subpœna* having been issued for their attendance in that case; and that the other witness, Gora Chand, was not then forthcoming, an order was passed directing the Provincial Court to examine the witness Gora Chand on oath, and the defendants, Obhychurn and Rajib Lochun, without oath, respecting the point at issue, and calling upon the Judge of the 24 pergunnahs, (in whose jurisdiction the appellant's residence was situated) to institute an enquiry into the truth of the facts asserted by Sumbhoo Chunder in his petition to the Provincial Court. The result of this investigation having failed to throw any further light on the subject, the Second Judge recorded his opinion that all further enquiry would prove unavailing, and that as the Maldah Commercial Resident had not attempted to prove that Sumbhoo Chunder, son of Bancha Ram, who had preferred the present appeal, was the identical man who had entered into security for the defendant, Obhychurn, the appellant was entitled to a decree exonerating her from all responsibility on that score, and that the decree of the Provincial Court, as far as she was concerned, should be reversed.

Mussum-
mant Ram
Sona, v.
Mr. George
Chester.

The late Third Judge (S. T. Goad) and the Officiating Judge (W. Dorin) concurring in the above opinion, a decree was passed to that effect. Costs of suit were made payable by the respondent. The other defendants not having joined in the appeal, the decree of the Court below, as far as it affected them, was left untouched.

1822.

MUNSA RAM, (Pauper), Appellant,

versus

Sept. 16th

JOWAHIR PANDE and others, Respondents.

Held that a special appeal preferred by a pauper in a suit instituted subsequently to the 1st of February 1815, could not be entertained. See note (a)

THIS case involved a question as to whether the Courts were legally and properly competent to admit a second or special appeal preferred by a pauper. The claim in this instance was for the sum of 3,410 rupees, principal and interest, of a balance of partnership accounts in trade. Judgment was given against the plaintiff in the Zillah Court of Cawnpore on the 9th of September 1818, and this judgment was affirmed by the Bareilly Provincial Court on the 20th of January 1820; and the question was, whether an appeal by the original plaintiff from the latter decision should

(a) Section 5, Regulation 2, 1825, however, is in the following terms: "Regulation 28, 1814, relative to paupers, not containing any specific provision respecting pauper appellants or respondents in second or special appeals, it is hereby declared, that the provisions in that regulation respecting appeals *in formâ pauperis*, from decisions passed in original suits, shall, *after the promulgation of the present regulation*, be considered applicable to any second or special appeals which may be preferred *in formâ pauperis*; and which may hereafter be deemed admissible under the rules specified in the preceding section." This rule, though it alters the law, furnishes a proof of the accuracy of the construction given in the above report.

or should not be admitted. The appeal had been admitted by the Second and Third Judges (C. Smith and S. T. Goad) but after the pleadings had been perused, a doubt arose in the mind of the Officiating Judge (W. Dorin) as to the legality of the admission of this appeal. The investigation of the case having been postponed, to allow of sufficient time for deliberating on this point, the Officiating Judge recorded his opinion to the following purport: The question is, should this appeal have been admitted, according to the spirit and intent of section 17, regulation 28, 1814? I am of opinion that no second or special appeal preferred by a pauper can be admitted by this Court in cases instituted subsequently to the 1st of February 1815. I think therefore that the case should be struck off the file on the ground of our incompetency to entertain it. My opinion is formed from the wording of the preamble and the several provisions of regulation 28, 1814. The preamble to that enactment states, that one of its objects is to reduce into one regulation the whole of the rules which will be applicable to persons suing *in forma pauperis*. The provisions of that regulation do not recognize the *right* of a pauper to a single appeal even. On the contrary, they specify the peculiar circumstances under which the indulgence should be accorded to him. There is no mention whatever in the whole enactment of a second appeal. The preamble to it shows that it was enacted for removing the public inconvenience which had arisen from admitting a certain description of persons to sue in the Courts of Civil Judicature as paupers, which practice had tended to facilitate the institution of groundless and litigious suits. The general rule of the regulations in force requires that the institution of all suits should be accompanied by the payment of the prescribed fees and other law expences. The pauper regulations contain some exceptions in favour of paupers; but they cannot claim any privileges besides those which are expressly accorded to them, and as the pauper regulation contains no exception in their favour in the case of a second or special appeal, they are, as to this, precisely in the same predicament as other litigants, and such appeals on their part can be admitted only on payment of the prescribed law expences. By the 17th section of regulation 28, 1814, it is enacted, that with respect to all suits instituted on appeals, preferred by paupers previously to the 1st of February 1815, the rules in force previously to that period shall be considered applicable. And according to the regulations then in force, the rule was generally, that on proof of inability to pay the costs of suit, the Courts might admit a plaintiff or appellant to sue *in forma pauperis*; and unquestionably, so long as that rule was in existence, a special appeal on the part of a pauper might have been admitted. Indeed the practice of this Court was formerly conformable to this principle. Witness the case of Narain Singh, pauper, appellant, *versus* Ajoodhia Geer and others, respondents, decided by Messrs. Colerbrooke and Fombelle. But upon the whole, I am clear that in the case of suits instituted after the 1st of February 1815, no special appeal, preferred by a pauper, can legally be admitted, and that any decree passed on such an appeal must be held to be null and void.

1822.

Munsa
Ram, v.
Jowahir
Pande and
others.

1822.

Munsa
Ram, v.
Jowahir
Pande and
others.

The appeal having been admitted by the Second and Third Judges (C. Smith and S. T. Goad) it was ordered that the question should be referred for their consideration; and on the 14th of September 1822, the Third Judge delivered his opinion in the following terms: I think the special appeal preferred by the pauper should be entertained in this Court according to the regulations in force, because, previously to the enactment of the rule contained in section 24, regulation 49, 1803, there was no mention made in any regulation of a second appeal. In the section quoted, it is laid down, that it shall be competent to the Provincial Court to admit a special appeal, if on the face of the decree of the Zillah or City Judge, or from any information before the Provincial Court, it shall appear to them erroneous or unjust, or if from the nature of the cause as stated in the decree or otherwise it shall appear to them of sufficient importance to merit a further investigation in appeal. This rule applies to all suits generally, and is not confined to cases of appeal preferred by paupers. The power which had been vested in the Provincial Courts of Appeal to admit a special appeal from the decrees of the Zillah and City Courts, in cases wherein a regular appeal did not lie to them, was declared to be equally vested in the Sudder Dewanny Adawlut, by clause 1, section 10, regulation 2, 1805. It is also provided in clause 2, section 10, of the regulation above cited, that with any petitions for a special appeal to the Court of Sudder Dewanny Adawlut, the appellant is to present a copy of the decree of the Provincial Court, together with the institution fee and security required in other cases of appeal. But many appeals have been admitted by persons suing as paupers, without payment of the prescribed fees. Although by the provisions of regulation 26, 1814, many of the rules before in force have undergone material alteration, and new rules have been laid down for the admission of second or special appeals, yet there is nothing in that enactment which can be construed to deprive any one of the benefit of a special appeal, whether he be rich or poor, if his pleas are of the nature described in the second section of that regulation. In a subsequent enactment (that of 28, 1814) the whole of the rules relative to paupers were amended, modified, and consolidated. The preamble to that regulation is as follows: "Whereas the rules now in force for admitting persons of certain descriptions to sue in the Courts of civil judicature as paupers have tended to facilitate the institution of groundless and litigious suits, and have been productive of public inconvenience: and whereas, it has been deemed expedient to reduce into one regulation the whole of the provisions which will be applicable to persons suing *in formâ pauperis*, the following rules have been enacted, to be in force from the 1st of February 1815, throughout the whole of the provinces immediately subject to the Presidency of Fort William." Although there is no express provision in the enactment in question for the admission of a special appeal preferred *in formâ pauperis*, yet, at the same time, it contains no prohibition against admitting such special appeals, which formerly used to be admitted on the part of paupers, as well as on the part of other individuals; nor does the preamble contain a single word to justify the supposition that it was intended to

Take away from paupers the right of special appeal. It merely provides for the consolidation of all the rules relative to paupers, and does not allude to the case of a pauper being either appellant or respondent in a special appeal. It is notorious that respondents have frequently in this Court been permitted to defend themselves *in formâ pauperis*, and this being permitted, an appellant should, on the same principle, have the same privilege. In the third and fourth sections of the regulation in question, mention is made of several suits original and appealed, which cannot be instituted *in formâ pauperis*, and in the twelfth section, which grants the permission of appeal, there is no special exception, such permission being granted, generally, without reference to regular or special appeals. In the seventeenth section, it is declared, that the rules of that regulation are intended to apply to regular suits and appeals only, and not to summary suits or summary appeals of any description. The regulation makes no mention of a special appeal. It would appear exceedingly unjust that a man should be called upon to defend himself *in formâ pauperis*, and at the same time be precluded from asserting his rights in the same form. I am of opinion that the word appeal, which occurs in regulation 28, 1814, has a general application, and includes special as well as regular appeals; and that the intention of the legislature was merely to prevent the institution of fraudulent, litigious, and groundless claims by paupers; but that it was never intended to exclude a pauper from the benefit of and hearing by a special or second appeal, when there may be sufficient ground for presuming that he has suffered a wrong. It appears, indeed, to be wholly repugnant to the spirit and intent of the provisions of regulation 28, 1814, to reject a petition of special appeal preferred by a pauper without listening to the pleas he may have to urge in support of the propriety of its admission. Under these circumstances, I am of opinion that the appeal preferred by Munsa Ram should be investigated on its merits. Differing, as I do, from the Officiating Judge, it is necessary that the point should be reserved for the determination of the Second Judge, who joined in admitting the petition of appeal. On the 16th of September 1822, the Second Judge (Mr. C. Smith) on a consideration of the arguments advanced by his colleagues respectively, expressed his opinion briefly that the petition of appeal in this case, having been preferred by the pauper on a date subsequent to the promulgation of regulation 28, 1814, had been erroneously admitted; and concurring in the view taken of the existing law by the Officiating Judge, it was ordered that the appeal should be dismissed accordingly.

1822.

Munsa
Ram, v.
Jowahir
Pande and
others.

1822.

SYUD SHAH BASIT ALI, Appellant,

versus

Nov. 19th.

SYUD SHAH IMAMOODDEEN, Respondent.

Held that the Moo-humudan legal objection of indefiniteness does not apply to a gift under which possession has been held for upwards of twelve years.

THIS suit was instituted *in forma pauperis* by the respondent in the Benares Court of Appeal, on the 24th of July 1818, against the appellant, to recover one moiety of mouza Mullaka and certain other rent free villages in pergunna Secundra, the eighteen fold annual produce of which was estimated at 81,699 rupees. The claim was founded on a *hibbanamah*, or deed of gift, alleged to have been executed by Noor Ali, the late proprietor, who was the common ancestor of the parties. The deed of gift was executed, according to the plaint, in the year 1215, A. H., and was attested by Hussun Reza Khan, the prime minister of Asufoodowla. The deed provided, that after the death of the donor, the plaintiff and defendant should possess jointly and in equal shares his entire property real and personal. Under the provisions of this deed, the plaintiff alleged, that after the death of the donor, he had lived with the defendant in joint possession of the property for nearly eighteen years, at the end of which time he had been wrongfully dispossessed by the defendant, and was compelled to institute this action for the recovery of his rights. The defendant, after denying generally the justice of the claim, represented in his answer the facts of the case to be, that when Noor Ali was about to die, he made over all his property to the defendant, who was his nephew, and had been educated by him as his son; but on going to Hussun Reza, whose advice he required on the occasion, that individual recommended him (as his nephew, the defendant, was a minor) to associate with him in the deed of gift the name of some respectable person, who would look after the minor's interests and take charge of his affairs; that this advice was followed, and the plaintiff, who was connected with the family by marriage, was chosen for the purpose; that the sole object of including his name in the deed was to procure the benefit of his experience in the management of the property, and that an allowance of 25 rupees *per mensem* was granted him for his expences, which allowance the defendant continued to pay him for a period of eighteen or nineteen years; but it was discontinued at the end of that period, on the plaintiff's exhibiting symptoms of an inclination to abuse his trust.

On the 28th of April 1820, the Senior Judge delivered judgment to the following effect: The deed of gift alleged to have been executed by the late proprietor Noor Ali, has been produced in Court; has been fully established, and, indeed, has been acknowledged by the defendant to have been the genuine act of the individual whose it purports to be, and that the parties lived together in joint possession of the property for a period of eighteen years, has not been attempted to be denied. There is no ground whatever for supposing, as alleged by the defendant, that the donor had any other intention than that which is apparent on the face of the deed. Both parties were nearly related to the donor, and from a letter of his, which has been filed, it does not appear that he entertained for either any superiority of affection. His object clearly was, that they should live together on terms of concord and amity,

enjoying the property left by him jointly, and without any difference or distinction; but as they have now quarrelled, the only equitable plan that remains is to make an equal division of the property, and assign one moiety to each individual. Judgment was given for the plaintiff accordingly. This decree was appealed from by the defendant to the Court of Sudder Dewanny Adawlut, and the chief objection urged by the appellant rested on a point of Moshummudan law (a), which declares the invalidity of indefinite gifts, of which nature the deed under which the plaintiff claimed was alleged to be. On the 19th of November 1822, this cause came to a hearing before the Third and Officiating Judges (S. T. Guad and W. Dorin) who affirmed the judgment of the Court below on the following ground: There is no doubt that the deed of gift executed by the deceased Noor Ali, in the year 1215, A. B., was intended to convey a joint donation, and it is also clear that under that deed the parties did get joint possession, which they retained until between two and three years before the institution of this claim. The legal objection of indefiniteness now raised against the deed under which both the donees have been in joint possession for a period of upwards of twelve years cannot apply, for it is evident that their possession has been all along with the consent of the party who now raises the objection. Even if the appellant had originally any superior right, he has resigned it by his own acquiescence. Under these circumstances the appeal was dismissed with costs, and mesne profits were awarded to the respondent during the period of his dispossession (b).

1822.

Syud Shah
Basit Ali,
v. Syud
Shah Ina-
moodeen.

ISHREE PERSHAD and MUSSUMMAUT PANA, Appellants,

1822.

versus

HURBUNS LALL and others, Respondents.

Dec. 10th.

THE respondents were plaintiffs in an action brought against Rooder Ram and Ishree Pershad in the City Court of Benares, on the 17th of March 1814, for the recovery of 2,360 rupees principal and interest on account of a bill of exchange.

It was set forth in the plaint, that the defendants had presented for sale to the plaintiffs a bill of exchange on the house of Bhowanee Ram and Jyepal Ram in Calcutta for 2,000 rupees, which being purchased was sent to Calcutta through the house of Bhowanee Doss and Baboo Hurkishen Doss, but on its being presented for payment at that city was dishonoured and returned on the hands of the plaintiffs, who made repeated applications to the defendants, but without receiving any satisfactory answer. The plaintiffs

The sellers
of a bill of
exchange
which was
not dis-
charged
though ac-
cepted by
the drawee,
held
respon-
sible for the
amount in
the first
instance,
without re-
ference to
the accep-
tor.

(a) In the case of a gift made to two or more donees, the interest of each donee must be defined, either at the time of making the gift or on delivery. See *Principles of Moshummudan Law*, page 50. There was another objection, against the gift in this case, which was not noticed by the parties, but which would have equally operated against the appellant, namely, that the donor did not relinquish possession during his life time.

(b) Another suit between the same parties, for the personal property was decided in favour of Inamoodeen on the same grounds.

1822. accordingly brought this action for the original sum of 2,000 rupees, and an additional sum of 360 rupees on account of interest for one year and a half. This case was sent for trial to the Court of the Additional Register of Ghazeepore. The defence was, that as Bhowanee Ram and Jyepal Ram, the drawees, had accepted the bill in Calcutta, they were responsible for its payment, and that the defendants had nothing further to do with it.

Ishree Pershad and Mussumant Panna, v. Hurbuns Lall and others.

On trial before the Additional Register it appeared to him that every circumstance connected with trade and credit rendered it necessary that both the seller and the acceptor of a bill should be held responsible for the payment of the same within the appointed time, nor could any defence avail against a custom which was every where understood and acted upon. On these grounds he gave a decree for the plaintiffs, ordering the payment of 2,000 rupees principal, and 1,051 rupees interest up to the date of the decree. The costs were also made payable by the defendants.

From this decree an appeal was preferred to the Provincial Court of Benares, where it was affirmed with costs.

The case was further carried by a special appeal into this Court. On examination of the whole of the proceedings connected with the two previous decisions, it was deemed proper to ascertain more minutely the custom of the Calcutta merchants, as to the party on whom the responsibility should rest, whether on the drawer or seller of it or on the acceptor, in the event of non-payment of an accepted bill. To this end the *Gomashtas* of the house of Nundram and Byjnath, and of Deves Das and Balmookund, two of the principal *Mahajunee* establishments in the city, were summoned before the Court and examined. From their evidence it was collected, that although, ordinarily speaking, the acceptor of a bill is liable for its amount, yet, if from any cause he should not discharge it, the bill is returned to the person from whom it may have been received; that if the drawer or endorser of the bill be on the spot the holder should give him information, but that there was no necessity for formally notifying the non-receipt of the amount of the bill; that regular protests were occasionally entered into, but that the practice was neither universal nor necessary; and that the drawer or seller of the bill was, under all circumstances, responsible for the payment of the amount, the seller being considered liable in the first instance, and after him the drawer. In answer to the question as to how far the omission on the part of the holder to give immediate notice to the drawer, of the non-payment, would except the drawer from responsibility, the witnesses replied that they were unable to state what would be the effect of that omission, as it was the invariable practice to give immediate notice, and they had never heard of an instance where this practice was departed from.

In the present instance, it was not alleged that any avoidable delay had occurred in communicating the fact of non-payment, and on the whole there appeared no reason for reversing the decrees of the Courts below, and they were therefore affirmed by the Third and Officiating Judges (S. T. Goad and W. Dorin). The appellant was made responsible for the amount, as ordered by the Zillah Register, with interest at the rate of twelve *per cent per annum* till

such sum should be discharged. They were also charged with the costs of all three Courts (a).

OMAR KHAN, (Son of AULUM BEG), Appellant,

1823.

versus

ABOO MOOHUMMUD KHAN and others, Respondents.

Jan. 13th.

THE plaintiff in this case was Omar Khan. He brought his action, in the Patna Court of Appeal, on the 29th of November 1815, against Aboo Moohummud Khan, Wulee Moohummud Khan, Moohummud Beg Khan, Burkutoollah Khan, Wajid Ali Khan, Jumaloodeen Khan, Qumur Oodeen Khan, Kureem Khan, Moohummud Yar Khan, Ameer Khan, Ismail Khan, and Nisa Begum, to recover a five anna, six dam, two cowrie share of pergunna Beest Hazaree, and other *altumgha* lands situated in the districts of Sarun, Behar, and Tirhoot, and a garden house in the city of Patna, *Muhulla* Dholpoora. The suit was laid at six lakhs, two thousand, six hundred and sixty-six rupees. The plaintiff was to the following effect: The *altumgha* land and the dwelling house now sued for were originally acquired by Shuhbaz Beg Khan, after whose death the property, agreeably to a decree of the Patna Provincial Council, bearing date the 20th of January 1777, A. D. devolved on Aulum Beg Khan the father of the plaintiff. The said Aulum Beg died in the year 1197, F. S., leaving the property which had so devolved on him entire. His heirs were his three sons Bahadoor Beg, Burrih Khan, and the plaintiff, and two daughters Mussummaut Uzeema and Mussummaut Huleema. His estate was therefore made into eight shares, of which each of his sons took two shares, and each of his daughters one, agreeably to the law of inheritance. The plaintiff's two brothers died childless, and after them his sister Huleema, leaving as her heirs only the plaintiff and his other sister Uzeema. Her property was divided, as prescribed by law in such cases, into three parts, of which two went to the plaintiff and one to his surviving sister. Aulum Beg had another son named Zein Khan, but he having died during the life time of his father, his son Qumur Oodeen was, according to the doctrine of the *Furaz*, excluded from the inheritance (b), not-

Held that *altumgha* lands are inheritable property, and ordered that they should be divided among the heirs of the original proprietor, their opponents claiming under a deed of gift alleged to have been executed in their favour by a person on whom the Patna Provincial Council had made a grant of the *altumgha* lands *de novo*, and in whose favour a decree to hold them passed by the same authority; it appearing that the *Persian* follow).

(a) The evidence in this case was extremely meagre. It did not appear whether the seller of the bill of exchange was the original drawer, or an intermediate endorser, or on what ground the drawees after having accepted the bill omitted the same to discharge the amount, whether from failure or from having no assets belonging to the drawer. The only point of law established was that the acceptance of a bill of exchange does not exonerate the seller of it from responsibility, if the amount should not be discharged by the drawee. This indeed was the only point to be determined, as upon it alone the defendants relied for exemption from the decree claim.

(b) The son of a person deceased shall not represent such person if he died Sudder Debefore his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance if he Adawlut have a paternal uncle. For instance, A. B. and C. are grandfather, father and considered son. The father, B. dies in the life time of the grandfather A. In this case the themselves son C. shall not take *jure representationis*, but the estate will go to the other bound to sons of A.—*Principles and Precedents of Mookummudan Law*, page 2.

1823. withstanding which the defendants had unjustly possessed themselves of the property in question. The defendant, Ameer Khan, replied, that the decree of the Patna Provincial Council cited by the plaintiff, had, at the suit of Nadira Begum *versus* Bahadoor Beg Khan, been set aside by the award of His Majesty's Supreme Court of Judicature, and that after the death of Shuhbaz Khan the *altumgha* lands were granted *de novo* to Bahadoor Beg, who disposed of them by four separate deeds of gift, one in favour of Aboo Moohummud and his other sons, a second in favour of the defendant, a third in favour of Moohummud Yar Khan, and a fourth in favour of Shumsoodeen and Qumur Oodeen, and that the donees were all in possession in virtue of their respective deeds of gift; that the defendant had since made over his share to his two sons, Noor Moohummud and Ismail Khan, and on the death of the former, to his mother; that the plaintiff himself had attested the deed of gift from this defendant to his son Noor Moohummud, and that after so long a time had elapsed, and the property had undergone so many transfers, the claim of the plaintiff was wholly inadmissible. Aboo Moohummud, Wulee Moohummud, Burkut Oollah, Moohummud Beg, Wajid Ali, and Jumal Oodeen, the six sons of Bahadoor Beg, put in a reply hardly at all differing from that of the first mentioned defendant, and they added that Aulum Beg was in possession of the property only as *Nazib*, or deputy, on behalf of their father when he was in Calcutta, and that he (Aulum Beg) had executed an *Ibranama*, or deed of relinquishment, in favour of their father. Moohummud Yar, Qumur Oodeen, and Kurream Khan delivered three separate replies, to the effect that the property in dispute, after the death of Shuhbaz Khan, descended to Aulum Beg, who granted four distinct *mokurree pottahs* of the same, one to Aboo Moohummud the son of Bahadoor Beg, one to Ameer Khan, the son of the plaintiff, one to Moohummud Yar, and one to Qumur Oodeen; that Bahadoor Beg recognizing the right of his brother's descendants, executed four instruments of the nature of deeds of partition in favour of each of them, in virtue of which they were in possession of their respective shares, and that the share of the plaintiff was in the possession of Ameer Khan his son. Mussumaut Nisa Begum, the wife of Kureem Khan, and Ismail Khan his son, rested their defence on the same ground as that individual.

On the 31st of May 1819, the Officiating Judge of the Patna Provincial Court delivered the following judgment: The plaintiff rests his claim on the decree of the Patna Provincial Council, which it is alleged awarded to his father Aulum Beg the right to the property in dispute. The defendants, on the other hand, maintain that that decree was set aside by the decision of His Majesty's Supreme Court of Judicature, mention of which is made in the decree of the Patna City Court, dated the 19th of November 1796; that the *altumgha* lands were subsequently granted *de novo* to Bahadoor Beg, in whose favour Aulum Beg executed a deed of relinquishment, renouncing all claim to them. Moohummud Yar, Qumur Oodeen, and the other defendants, call the deeds partition deeds. Now admitting the deed of relinquishment executed by Aulum Beg, and the *mokurree pottahs* subsequently granted

awarded to the donor possession as manager only for the ancestor, and as no grant for lands whose produce exceeded 1,000 rupees per annum could be valid without the sanction of the Supreme Council, which had not been obtained in this instance.

by him to Aboo Moohummud and others, and the deeds of gift executed by Bahadoor Beg, still, supposing the lands to have been conferred *de novo* on Bahadoor Beg, as some compensation to him for the distress, trouble and vexation incurred in the case of Nadira Begum, and with a view to the support also of Aulum Beg and his descendants, it was, nevertheless, competent to him (Bahadoor Beg) he having the entire and exclusive possession of the property, to transfer it by gift to Ameer Khan, Moohummud Yar, Qumur Oodeen, Aboo Moohummud, and the other donees respectively; and as no objection was taken to the legality of the gifts at the time of their being made; as under them the defendants have held possession for a period of more than twelve years without any opposition; as no person objected to the legality of the gift during the long interval that elapsed between the death of Bahadoor Beg and the institution of this suit; as the plaintiff came to this country from Cabul in the year 1205, F. S., after the death of Bahadoor Beg, and it is impossible therefore he should have been ignorant of the execution of the deeds of gift under which the defendants hold possession; as he would assuredly have preferred his claim before, if he considered it to be founded in right, and as the plaintiff has adduced no proof that his son Ameer Khan was agent on his behalf, and that through him he received the profits of the property in dispute; his claim, preferred after the lapse of so many years, is now inadmissible, under the regulations in force. The suit was therefore dismissed, and all the costs made payable by the plaintiff.

1823.

Omar
Khan, v.
Moohum-
mud Khan
and others.

An appeal was presented from the above decision by Omar Khan, but he dying shortly after the admission of the appeal, was succeeded by his son Moohummud, who filed the following among other pleas of the appeal: The Supreme Court has no power to interfere with the decrees of the Company's Courts, consequently the allegation that the decree in favour of Aulum Beg was set aside by the decision of the Supreme Court is wholly futile, and the rights awarded to him by the Patna Provincial Council remain untouched. The story of the gift made by Bahadoor Beg of the *altumgha* lands is wholly without foundation. It appears from the decree of the Patna Council that, in conformity to the opinion of the *Cazee* and *Mooftees*, the whole estate left by Shuhbaz Khan was made into twelve parts, of which nine were awarded to Aulum Beg and three to Nadira Begum. Under these circumstances, it is extremely improbable that the Government, having recognized the right of those persons, should proceed deliberately to exclude their heirs by conferring the *altumgha* lands on Bahadoor Beg. As to the deed of relinquishment set up by the respondents, the original of it has never been filed, but only an unauthenticated copy, which cannot avail; it being susceptible of proof that the appellant's grandfather was in possession of the *altumgha* lands until the year 1197, F. S.; whereas the alleged deed of relinquishment bears date in 1195, F. S. The fact is not as stated by the defendants, that the appellant's grandfather, Aulum Beg, was all along kept out of possession; and even had the fact been so, the claim would not have been barred agreeably to the provisions of regulation 2, 1805, which extended the period of

1823. limitation to sixty years; and in the third clause of the third section of which it is laid down, that if the second possessor shall have obtained the property by unjust or dishonest means, notwithstanding the lapse of twelve years, the case shall be cognizable and be investigated on its merits. Bahadoor Beg was merely the trustee of the property. It can be proved that the appellant's grandfather received his share of the joint produce, and that the lands, in the year 1211 F. S., were held in joint tenancy. The Officiating Judge of the Patna Court has stated in his decree, that the appellant had produced no proof that his son Ameer Khan was acting as his agent, or that he himself derived any of the profits from the estate; but it has been proved that after the death of Aulum Beg, Bahadoor Beg acted as the agent for the appellant's father, and Burrih Khan his brother, and in that capacity defended the suit of Nadira Begum, and that after the death of Bahadoor Beg, Ameer Khan became the agent and was entrusted with the superintendence of all the family affairs. The respondents, Moohummud Ameer Khan, Ismail Khan, and Nisa Begum, commenced their reply by stating they had in the Court below amply refuted the appellant's allegations. They however deemed it necessary to enter more at large into the subject, which they did by the following statement: Shuhbaz Beg Khan having no children adopted Bahadoor Beg as his heir and successor, and conferred on him the proprietary right to and put him in possession of the *altumgha mehals* now in dispute, he acknowledged this grant before the Provincial Council of Patna, and before Mr. Hastings and the Supreme Council at the Presidency, as would be evident from his written declaration to that effect, signed by all the principal inhabitants of the city of Patna. When Shuhbaz Beg died, his widow, Nadira Begum being instigated by certain evil minded persons, caused great annoyance to Bahadoor Beg, and began to appropriate her deceased husband's property, pretending that he had executed a grant of it in her favour. Bahadoor Beg was then compelled to sue her before the Patna Provincial Council, and the law officers being consulted on the occasion, her fraud was discovered, and it appeared from the legal opinion delivered on that occasion, that, as *altumgha* lands did not form a fit subject of dower, the rest of the property which had belonged to Shuhbaz should be made into four parts, of which three belonged to Aulum Beg and one to Nadira Begum. But the Patna Provincial Council not paying sufficient attention to the opinion of the law officers, provided in their decree that Bahadoor Beg should hold possession on account of Aulum Beg, and that Nadira Begum should receive one-fourth of the profits of the *altumgha* lands from the said Bahadoor Beg during her natural life. On this Bahadoor Beg petitioned for a review of judgment, and the Patna Provincial Council finding, on reconsideration, that they really had acted in contravention to the opinion of the law officers, passed another decision on the 27th of January 1777, in favour of Bahadoor Beg, to the effect that the whole of the *altumgha* lands belonged of right to Bahadoor Beg from the date of the demise of Shuhbaz. To this decree Aulum Beg was not even a party. It has been passed upwards of forty years ago, and the award it

Omar
Khan, v.
Moohum-
mud Khan
and others.

contains has been since recognized in the decree of the Patna City Court dated the 19th of November 1796. That decree was passed on the action instituted by the widow Nadira against Bahadoor Beg for a fourth share of the *altumgha* lands. Had any part of those lands been awarded to Aulum Beg, or had he possessed any proprietary right therein, he would doubtless have been made a defendant. The fact is, that when Nadira Begum sued Bahadoor Beg in the Supreme Court of Judicature, and procured his imprisonment, there was no one to look after the *altumgha* lands; and the Patna Council authorized his father (Aulum Beg) on the 12th of February 1799, to make the collections during the interval that elapsed before the Government procured his liberation by putting in bail for his appearance. Any orders which he may have obtained under such circumstances cannot form any evidence of Aulum Beg's proprietary right; on the contrary, indeed, had he possessed such right, orders granting him authority to make the collections would have been wholly unnecessary. Besides, had he possessed any such right, Nadira Begum would have sued him as well as Bahadoor Beg in the Supreme Court. The *ibranamah*, or deed of relinquishment, executed by Aulum Beg, is an authentic instrument. It was acknowledged by him before Mr. Thomas Law, on the 17th of April 1787, and its authenticity was moreover recognized in the decree of the Patna Provincial Court of Appeal, dated the 28th of November 1811, in the case of Burkut Oollah Khan, appellant, *versus* Aboo Moohummud Khan, respondent. The question therefore as to the legality or illegality of the gifts made by Bahadoor Beg is wholly irrelevant, as far as concerns the interest of Aulum Beg and those claiming under him. The facts of the lapse of time and of the attestation by the appellant's father of the deed of gift made by Ameer Khan to one of his sons form insuperable obstacles to the entertainment of this claim; and besides, in the suit between Burkut Oollah and Aboo Moohummud, decided in the year 1811, Ameer Khan tendered his share of the *altumgha* as security for the respondent, and in that instance had any one of the heirs of Aulum Beg possessed a right, they would assuredly have interfered. These respondents concluded by stating, that the answers of Qumur Oodeen and Moohummud Yar, in the Court below, were wholly false, and that those two individuals had conspired with the appellant to defraud the rest of the donees of their just rights. The respondents, Moohummud Yar and Qumur Oodeen, replied severally to the pleas of appeal, by stating that the appellant had wholly mistaken the meaning of the second regulation of 1805, because, in the first clause of section 3, of that enactment, it was distinctly declared, that although property may have been acquired by an insufficient title within the period of sixty years, if the property so acquired shall have descended by inheritance to the person in possession when the claim thereto may be preferred after a lapse of twelve years, &c. &c. the claim shall not be cognizable. They repeated the assertion, that Aulum Beg had conferred on themselves and the other respondents the *mokurreree pottahs* which had been confirmed by Bahadoor Beg. Aboo Moohummud Khan, another respondent,

1823.

Omar
Khan, v.
Moohum-
mud Khan
and others.

1823. gave in a separate reply, differing but little from that of Moohumud Ameer Khan and the other two respondents first mentioned. The other respondent did not appear. At this stage of the proceedings the widow, daughter, and grand-daughter of Aulum Beg, each severally preferred interlocutory petitions, praying that their rights as heirs to the above named individual might not be overlooked.

Omar
Khan, v.
Moohum-
mud Khan
and others.

On the 29th of January 1822, the Third and Officiating Judges (Messrs. S. T. Goad and W. Dorin) having perused the whole of the proceedings and evidence adduced in the Court below, recorded their judgment in the following terms: It appears that the *altumgha* lands in dispute were the property of Shuhbaz Khan, who died in the *Fuslee* year 1184. In the cause brought before the Patna Provincial Council, the plaintiff was Bahadoor Beg Khan, one of the sons of Aulum Beg, half brother of Shuhbaz, *versus* Nadira Begum, defendant. The decree in that case was passed on the 20th of January 1777, corresponding with the *Fuslee* year 1184. That decree determined that the claim of the plaintiff, whether in virtue of the alleged adoption or in virtue of the gift, was not substantiated, and that of the property of Shuhbaz nine shares belonged of right to Aulum Beg, and three to Nadira Begum, the profits of a third share of the *altumgha* lands being awarded to her. The decree went on further to provide that the *altumgha* lands should remain in the possession of Bahadoor Beg, from which it is inferrible that no other member of the family who resided in Cabul was on the spot at the time. Of the two parties in this case, one is desirous of proving that Bahadoor Beg, one of the sons of Aulum Beg, was in possession of the *altumgha* lands as rightful proprietor; and that they derived their tenures by grant from him: the other of proving that Aulum Beg Khan was the sole proprietor; that the alleged grants are invalid, and that the *altumgha* lands should now be distributed agreeably to the law of inheritance, among the heirs of the said Aulum, to which the former party oppose lapse of time and their grants. In point of fact, however, Bahadoor Beg appears to have been merely the agent employed to look after the *altumgha* lands on behalf of the family of Aulum Beg, and no faith can be placed in the deed of relinquishment, alleged by Aboo Moohummud and the other respondents to have been executed, after the decree of the Patna Council, by Aulum Beg in favour of Bahadoor Beg. Such deeds are always suspicious, nor is it at all conformable to experience to find a father surrendering, without any apparent cause, his property to one son to the exclusion of the rest. The instrument adduced by the respondents, purporting to be an order from the Council at the Presidency, dated seven days after the decree of the Patna Council, and directing that the whole of the *altumgha* lands should be given up to Bahadoor Beg, does not appear to be authentic, as it bears no English signature, and the circumstances under which it is said to have been issued, render it extremely suspicious, and from another original voucher dated the 21st of April 1785, and duly attested, it appears that the *altumgha* lands had come into the possession of Aulum Beg ever since the death of Shuhbaz Beg. The plea of the respondents

that the decree of the Patna Council was reversed by the Supreme Court of Judicature is inadmissible, inasmuch as that Court has no authority or jurisdiction in the case, as has been determined by the Home Authorities. The mere fact of Bahadoor Beg having been designated *altumghadar* in some of the late records, from the circumstance of his having been appointed agent in consequence of the rest of the family residing at Cabul, cannot be held sufficient to invest that individual with the exclusive proprietary right to all the *altumgha* lands. On the death of Aulum Beg the whole of the *altumgha* lands should have been divided among his heirs agreeably to the Moosulman law of succession, and Bahadoor Beg should be held to have been acting merely as agent, so far as the shares of the coheirs are concerned, and on his death Ameer Khan should be considered in the same light, while he retained possession up to the year 1211 F. S. As to the deeds of gift, they purport to be confirmatory by Bahadoor Beg of *mokurreree* grants formerly made by Aulum Beg, under which one share is claimed by Shumsoodeen and Qumur Oodeen, sons of Zeyn Khan, one share by Abou Moohummud, and the five other sons of Bahadoor Beg, one share by Moohummud Yar, son of Burrih Khan, and one share by Ameer Khan, son of Omar Khan. But as Bahadoor Beg was in possession of the property as agent, not as proprietor, any disposition of the above nature on his part must be wholly illegal; and as to the assertion by Qumur Oodeen and the other respondents, that *mokurreree* grants had been previously made by Aulum Beg, the reasons set forth in the decree of the Patna Provincial Court, dated the 26th of November 1811, are sufficient to rebut it; for if such grants really did exist in the *Fuslee* year 1195, there could have been no sort of necessity for the execution of the alleged deeds of gift by Bahadoor Beg in the year 1202; nor does there appear to be any evidence whatever as to the existence of such *mokurreree* grants, except what consists in the mention of them in the alleged subsequent deeds of gift. Although in the decree of the Provincial Court above referred to, there certainly is an incidental recognition of the deeds of gift, yet that decree was passed in a suit in which one of the sons of Bahadoor Beg sued another, and it cannot affect the rights or interests of third persons, and in that suit it was not the interest of either of the litigant parties to invalidate the deeds of gift. On the contrary, they were both desirous of maintaining the validity of these deeds. It appears that, seven or eight years before that decree was passed, the decision of the Court of Sudder Dewanny Adawlut was passed in the case of Nadira Begum, appellant, *versus* Oomar Khan and others, respondents, in which case Bahadoor Beg, for himself and on behalf of his two brothers, Burrih Khan and Omar Khan, sued to recover three out of four shares of the moveable property left by Shuhbaz Beg, and that the decision in question recognized the rights of the heirs to the moveable property of Aulum Beg. The suit brought for a share of the *altumgha* lands alleged to have been left by Aulum Beg, in which Wajid Ali Khan, his grandson, was plaintiff, against Qumur Oodeen, another grandson, defendant, cannot affect the nature of the present claim. They were put into their respective shares

1823.

Omar
Khan, v.
Moohum-
mud Khan
and others.

1823.

Omar
Khan, v.
Moohum-
mud Khan
and others.

agreeably to the deeds of gift which they produced, but it by no means follows that their possession under those deeds should have been upheld, if any other heir who had been excluded had claimed his share in virtue of his right of inheritance. Two points, however, deserve consideration, before an order can be issued for the partition of the *altumgha* lands agreeably to the law of inheritance. In the first place, whether the possession of those who claim under the deeds of gift has been continued for a period exceeding twelve years, without reference to the legality or illegality of those deeds, so as, agreeably to the rules of limitation, to exclude the cognizance of the present claim, and, in the second place, whether Shumsodeen and Zeyn Khan died before Aulum Beg, so as to exclude Zeyn from the inheritance of his property. It has been established that on the 17th of February 1812, corresponding with the 20th of *Phalgun* 1820, F. S., in the suit between Wajid Ali Khan, *versus* Qumur Oodeen Khan, as well as on the 11th of February 1815, corresponding with the 17th of *Magh* 1222, the appellant came forward as an interlocutory claimant, and urged his right of inheritance. If (as the Court incline to think is the case) Bahadoor Beg and, after his death, Ameer Khan were in possession of the *altumgha* lands, not as the sole proprietors, but as agents on behalf of the other heirs of Aulum Beg, and if (as was the case), up to the year 1213, F. S., there was no registry made in the Collector's books of the names of the present possessor, the limiting regulations cannot apply in bar of the claim. It is besides a matter worthy of consideration, that the exclusion of some of the members of the family who are really heirs, cannot properly consist with the possession of shares by others who stand in the same relation. It would appear that Shumsodeen died in the year 1203, F. S., but the date of the death of Zeyn Khan cannot, from the conflicting nature of the testimony adduced, be determined with any degree of accuracy, nor can it be ascertained whether he died before or after the death of Aulum Beg, which took place in the year 1197, F. S.; but, as the execution of the deeds of gift (without reference to their legality or otherwise) took place in 1202, F. S., it is inferrible that the death of Zeyn Khan occurred subsequently to that of Aulum Beg, because, if he died previously to Aulum Beg, how did it happen that he and his sons being excluded, a share was assigned to the latter in the deeds of gift. It now remains to be enquired what became of the fourth share of the *altumgha* lands, or of the profits thereof, which, according to the decree of the Patna Provincial Council, belonged to Nadira Begum; but on an inspection of that decree it does not appear that it ever awarded to her possession of any portion of the lands in question. It is worded thus: All the *altumgha* lands shall remain in the possession of Bahadoor Beg, on behalf of Aulum Beg, and the said Bahadoor Beg shall pay over annually to Nadira Begum three out of twelve shares of the profits thereof during her natural life. The above provision is made subsequently to that which awards to Nadira Begum absolutely, as heir, a fourth share of the other property, real and personal, which had belonged to Shuhbaz. The decree of the Patna City Court, dated the 19th of November 1794, in the suit in which Nadira Begum sued Bahadoor

Beg for a fourth share of the *altumgha* profits from the year 1184, to the year 1200, rejects her claims on the following grounds : first, that the claim of the plaintiff founded on a decree of 1777, was barred by the rule of limitations; and, secondly, that the decree on which it was founded had been reversed by the Supreme Court of Judicature. But this Court has only to do with the decree of the Patna Provincial Council, and whether that was right or wrong the heirs of Nadira Begum cannot under it claim a fourth share of the *altumgha* lands. There seems now to be no other safe alternative than to make a division of those lands among the heirs of Aulum Beg agreeably to the law of inheritance, so as to preserve inviolate the rights of all parties, and protect those members of the family who, from being at a distance or other cause, were unable to secure their due shares of inheritance. A decree was therefore passed agreeably to the above opinion by the Third and Officiating Judges, who sat in the case, on the 29th of January 1822, and the decree of the Court below was reversed; but there appearing to be contradictory statements as to the number of the surviving heirs, the Patna Court of Appeal were desired to ascertain the point with accuracy, and to acquaint this Court with the result of their investigation, in order that a *futwa* might be taken from the law officers, as to the allotments to be made to the several claimants.

1823.
Omar
Khan, v.
Moohum-
mud Khan
and others.

A petition for a review of the above judgment was subsequently presented.

The petition was *verbatim* as follows :

The case in which Moohummud Khan, heir of Ameer Khan deceased, is appellant, and we are respondents, has come before the Court, and for the reasons specified in the proceedings of January 29, 1822, the decree of the Provincial Court has been reversed, and a partition of the estates ordered between the heirs of the late Khaja Aulum Beg. The reasons which influenced the Court may be thus briefly stated : In the decree of Council, dated January 20, 1777, the proof of the adoption of the late Khaja Bahadoor Beg was considered unsatisfactory, and the *altumgha* villages and other property of Khajah Shuhbaz Beg Khan were divided into twelve shares, nine of which were adjudged to Aulum Beg. Doubts were attached to the *ibranamak* filed by us, on the ground of the great improbability that any one should, without any cause, transfer his possessions to one of his children, to the exclusion of himself and other children from all enjoyment of them. The copy of the Order of the Council, dated January 27, 1777, only seven days after the date of the decree, was considered contradictory in its terms, without any foundation, and unattested by the signature of any member. Stress was also laid on the *purwanah* bearing the signature of Mr. Bushby, from which it appeared that the *altumgha mehals*, after the death of Shuhbaz Khan, came into the possession of Aulum Beg Khan.

Now we have obtained from the Record Office of the Council in Calcutta a copy of the summary of the proceedings of the Patna Council in the case of Khaja Bahadoor Beg Khan, *versus* Nadira Begum. On diligent search amongst the papers of Khajah Bahadoor Beg Khan, which were scattered about in different places, we have

1823.

Omar
Khan, v.
Moohum-
mud Khan
and others.

recovered the original *ibranamah* of Aulum Beg Khan, dated the 1st of *Sufur*, A. H. 1202. In the records too of this Court we have found the Order of Council, dated January 27, 1777, A. D., and other documents from which the right of Khaja Bahadoor Beg Khan to the *altumgha* estates is clearly proved. On these grounds it may be considered equitable to grant a review of judgment, and a consequent restitution of our just rights. It is in this hope that we beg the Court's favourable consideration of the following reasons on which we ground our expectation: *First*, It appears from the summary of the proceedings of the Patna Council, a copy of which we have obtained from the records of the Council of Calcutta, that after the demise of Shuhbaz Beg Khan, on the occurrence of the dispute between Khaja Bahadoor Beg Khan and Nadira Begum regarding his property, the Members of the Patna Council deputed the law officers, viz. the *Cazee-Ool-Coozat* and *Mooftees* of Patna to investigate the case. The *Cazee* and *Mooftees* after duly weighing all the circumstances, submitted a statement of the case, containing a summary of their proceedings and their *futwa*. Their opinion was this, that with the exception of the *altumgha* estates, which could not be considered as included in the heritable property of the deceased, or liable for the debt of dower, all the possessions and houses, &c. left by the late Shuhbaz Beg Khan should be divided into four parts, of which Nadira Begum should take one, and Khaja Bahadoor Beg three, in right of his father, who was a legal claimant of a share and residuary heir, and in his own right, as himself reputed son of the deceased. This opinion was adopted, and on the 20th of January 1777, a partition of the property was decreed, the *altumgha* estates being, according to established usage, made over to Bahadoor Beg Khan, with an obligation on him to appropriate one-fourth of the proceeds to the support of the widow. There will be found amongst the proceedings in this case, the original report of the execution of the decree for the partition of the property in conformity with the report of the law officers, which report, according to the custom of that time, is designated "a *sijil* and *sooruthal*," and which the law officers, agreeably with the order of the Council, dated March 20, 1777, impressed with their own seals, attested by the principal men of the city of Patna, and delivered over to Khajah Bahadoor Beg Khan. It appears then that the Judges of the Provincial Court, on the 20th of January 1777, ordered the *Cazee* and *Mooftees* to divide all the property of Shuhbaz Beg Khan into twelve shares, of which three were to be given to Nadira Begum, and the remaining nine shares accruing to Aulum Beg to be entrusted to his son Bahadoor Beg Khan. It moreover appears from the above report, that the deed of gift and the public acknowledgment set up by Nadira Begum, being considered invalid by the law officers, the Members of the Council awarded the *altumgha* estates of Bahadoor Beg Khan in the place of Shuhbaz. The confirmatory grant, with the Company's seal and an English signature given by the Council on the 27th of January 1777, to Bahadoor Beg Khan, runs thus: "Let all the zemindars, talookdars and malgoozars of the *altumgha mehals* in Soobah Bahar, know, that whereas the above estates have been put into the possession of Bahadoor Beg Khan, son of

Aulum Beg, in the place of the late Khan, it behoves them to cultivate and use the land according to the will and directions of the aforesaid, &c. &c." From the abstract of the proceedings in English in the Record Office of the Council, which itself contains a summary of the report of the law officers, the authenticity and validity of the aforesaid report is established; and surely no further proof is necessary beyond what is afforded by that document, than which nothing can be more determinate.

1828.

Omar
Khan, v.
Moohum-
mud Khan
and others.

As to the decree produced by the appellants in the Persian language, and styled a *faisula* of the Council, written on the 20th of January, 1777, on which the Court have grounded their decision in this case, inasmuch as it directs the property, houses, and other possessions of Shuhbaz Beg Khan there and in other places to be computed, and three portions to be given to Nadira Begum, and the remaining nine shares accruing to Aulum Beg to be made over to his son Bahadoor Beg, it is correct and agreeable to the aforementioned report. But inasmuch as it is subsequently specified, that the *altumgha mehals* should be made over to Bahadoor Beg Khan, *on the part* of Aulum Beg, it is at variance with the report, the English abstract, and the order entered in the decree. From all the documents in the case, it is clear that the Judges of the Council passed a decree confirmatory of the award of the law officers. Now whereas they in their *futwa* excepted the *altumgha mehals* from the heritable estate of the deceased, it follows that the Members of the Council ordered the *altumgha* estates to be made over to Bahadoor Beg Khan, and the other estates and houses of Shuhbaz Beg Khan to be divided between Aulum Beg Khan and Nadira Begum as his heirs. The English Orders of Council, dated January 20th, 23d, and 30th of 1777, and the confirmatory grant, dated the 27th of that month, and the report of the law officers, afford unquestionable proof of the accuracy of this statement. No one can believe that the Members of the Council, in opposition to these orders and the *futwa*, again included the *altumgha* estates among the other property, and ordered them to be made over to Bahadoor Beg Khan *on the part* of Aulum Beg Khan. Had they passed such a decree in opposition to the *futwa*, they would undoubtedly have entered the reasons of their dissent in the English books, and also have specifically stated in the order of the decree that the *altumghas* were included in the other estates, and to be made over to Bahadoor Beg Khan on the part of Aulum Beg. As this is not the case, the Persian decree filed by the appellant and containing this additional clause, that the *altumgha* estate should be made over to Bahadoor Beg *on the part* of Aulum Beg, is far from exempt from suspicion. On the contrary, it is probable that some one having altered the decree so as to suit his own purpose, has procured some subtle artist to forge the seal and signature in exact resemblance of the original. We should remark that our arguments are founded on translations of the English documents, our ignorance of the language incapacitating us from consulting the originals. We therefore hope that the Persian decree filed by the appellant may be re-examined with reference to the English orders and report of the law officers.

Again, the order setting aside the adoption of Bahadoor Beg by

1823. Shuhbaz Beg is altogether omitted in the English orders and Persian decree filed by the appellant. It may be objected, that adoption does not create a legal title to inherit, and that the *altumgha* estates are susceptible of being comprized amongst the other property, and consequently of partition. We urge in reply, that upwards of 40 years have elapsed since the decree was passed in Bahadoor Beg's favour against Nadira Begum, and that according to the regulations in force, however erroneous we may suppose the decree to have been, it is now become incapable of amendment or alteration. No Judge in the present day, on discovery of the error, can order its correction. Had Aulum Beg really had any objection to urge against the decree, he would undoubtedly have taken measures for its revisal at the time, or within twelve years subsequently. Inasmuch as he neglected to do this, his heirs have now no right to except against the obligation arising from it.

Omar
Khan, v.
Moohum-
mud Khan
and others.

Secondly.—Supposing Aulum Beg had legally a right to the *altumgha* estates, yet, inasmuch as he relinquished that right for reasons specified in the *ibranamah*, his heirs, notwithstanding so many intervening successions, can now assert no claim to them. We have filed the original *ibranamah* with the English signature, the seal of the law officers, and the Company's seal, attested by the principal men of Patna; although its authenticity must be apparent on the first glance, we will yet adduce some additional proofs, the more clearly to establish this point.

1.—Aulum Beg submitted the original *ibranamah* with a petition to Mr. Law. A copy of this petition is amongst the documents, and the original is still preserved in the office of the Collector of Zillah Bahar.

2.—Bahadoor Beg Khan himself, in 1203 F. S., at the period of the promulgation of regulation 37, 1793, filed a copy of the *Ibranamah* in the Collector's office.

3.—Twelve years previous to this Khajah Aboon Moohummud Khan, in a suit brought against him by Burkut Oollah Khan, procured a copy of this *ibranamah* from the Collector's office, and filed it in the Zillah Court. This copy was admitted by the Judge. Subsequently by the Superior Court; and even on appeal to the Sudder Adawlut, no suspicion was cast on it's authenticity.

4.—In the case of Wahid Alee Khan, *versus* Qumur Oodeen Khan, some respectable witnesses deposed to the *ibranamah*, and Mr. Cornish, in consequence of the objections pertinaciously urged against it by the heirs of Aulum Beg Khan, procured the books from the Collector's office, and satisfactorily established the fact regarding it.

5.—Supposing the *altumgha* estates in the case of Nadira Begum not to have been the right of Aulum Beg, then it is no way improbable that he gave them to Bahadoor Beg, his favourite son, for the reasons specified in the *ibranamah* and petition. Because, after the death of Shuhbaz Beg, Aulum Beg had no right to take *altumgha* and other estates from the widow, in opposition to the deed of gift and public acknowledgment alleged by her, but so much property having come into his possession without labour or trouble, he esteemed them a great acquisition, and in gratitude

relinquished the *altumgha* estates in favour of his son Bahadur Beg. 1823.

But independently of these arguments, it should be remembered that this sort of gift is by no means opposed to the practice of the country. On the contrary, it is no unfrequent occurrence for a father, notwithstanding his having many sons, to transfer the whole of his property to one favourite child to the exclusion of himself and the others, and that with a view to the maintenance of the dignity and importance of his family. For should the division of large zemindarees and rajahships, and other similar estates, take place amongst all the sons for many descents, they would dwindle down to the size of a few beegahs or biswahs, and all the dignity and respectability of the family be lost. In bestowing a gift, moreover, on a son who is in the habits of constant obedience to and dependence on the parent, the father does not become himself excluded from all enjoyment of it, according to the well known adage, "Thou and thine are thy father's." We will however adduce some instances to prove our assertion.

Omar Khan, v. Moohum-mud Khan and others.

1.—Not long ago Rajah Mitrajeet Singh, one of the principal Rajahs in Zillah Behar, gave all his raj and zemindaree to his eldest son, with the view of permanently establishing his name; and thus during his life time excluded himself and other children from the possession of it. A suit arising from this transaction is now pending. After passing through the inferior court, it is at present before the Sudder Adawlut, and the petition will shortly come to a hearing.

2.—The Rajah of Burdwan, although he had every reason to expect a long life, gave all his raj to his son; and a dispute at present exists between himself and his son's widow, which the Sudder Court have adjusted by a summary proceeding.

3.—The Rajah of Nuddea, although he had many sons, bestowed the raj and zemindaree on his favourite amongst them, and this gift was upheld by the Sudder Court. But, besides these instances, Madhoo Sing, Rajah of Tirhoot, and Beer Kishore, Rajah of Sarun, Chumparun, and Bettiah, during their life time, gave up their estates to their eldest sons, to the exclusion of their other children, and have since died; but the donees maintain undisputed possession of the estates and lacs of rupees. In addition to all these arguments, the passive acquiescence of Aulum Beg Khan, and his sons Khajah Omar Khan, and Khajah Burrih Khan, in Bahadur Beg's possession and administration of the *altumgha* estates, during a period of 40 years, is another presumptive proof in favour of the authenticity of the deed of gift.

Thirdly.—We submit the original *purwanah*, dated January 27, 1777, with an English signature and the Company's seal. A glance at it will dispel every doubt which might have arisen on inspection of the copy, and it will be clear that it is not at variance with the orders of the 20th, 23d, and 30th of January 1777, which are entered in the English abstract, and in which the *altumgha* estates are clearly stated to belong to Bahadur Beg Khan, without even any mention of Aulum Beg. A copy also of the aforementioned *purwanah*, viz. the *umul dustuk*, is entered in the report of the law officers, dated *Sufur* 15, A. H. 1191, corresponding

1823. with March 31, 1777, which is styled *sijil* and *sooruthal*. Copies of it are also filed in all the Collector's offices in Zillah Behar.

Omar
Khan, v.
Moohum-
nud Khan
and others.

Fourthly.—Mr. Bushby's *purwanah* giving possession to Aulum Beg Khan, which has been filed in the proceedings will be found on candid examination to contain a contradiction within itself. It is stated in the *purwanah*, that after due investigation of the copies of the *firmans* and *sunnuds* of former Nazims, and the decree and copy of the *sunnud* of Council and the *sijil* and *sooruthal*, it appeared that Aulum Beg Khan got possession in succession to Shuhbaz Khan. Now, so far from this being the case, there is not in a single document any mention of his ever obtaining possession; should then the *purwanah* prove to be thus directly at variance with the very documents on which it professes to be grounded, it cannot surely avail as a proof in favour of any one, but must evidently be rejected.

Fifthly.—It is stated that Aulum Beg was not proprietor of the *altumgha* estates, but only agent, superintendant, or manager of them; but we beg the Court to consider that none of the documents in the case afford ground for such a presumption. It may be objected, that the opinion is adopted from the proceedings in the case in which Nadira Begum and others were respondents, in which Bahadoor Beg appealed in his own name and as agent for his brothers, for three out of the four shares of the property of Shuhbaz Beg Khan. We urge in reply, that that case bears no analogy to this. That related to the personal property which the Council of Patna had decreed to Aulum Beg Khan, and this for the *altumgha* estates, which the Council entirely made over to Bahadoor Beg, and to which no right of Aulum Beg could attach as appears from the decree and *ibranamah*; nor consequently could they, after his death, be considered as forming part of his property. In this case the succession of himself and his brothers to the *altumgha* estates cannot justly be inferred from his having sued in his own and their names for the personal property.

The documents then which we now submit, and on consideration of which Aulum Beg's right will appear unfounded, are these: The proceedings of Council; the investigation of the law officers; the *ibranamah*; the *umul dustuk* dated January 27, 1777; the release of Rajah Gopal Sing proprietor of pergunnah Beest Huzaree, and signed by the Patna Council, dated *Sufur* 10, 1184 F. S.; the decree of Council by Lord Cornwallis, Mr. Speke, &c. dated August 9th, 1792; the decree of the Foujdarry Court of Zillah Bahar, dated December 16th, 1805; the report of the *Canoongoe* of Zillah Sarun, dated August 15, 1819; the decree of the Dewanny Court of Zillah Sarun, dated November 19, 1799; the petition of Bahadoor Beg Khan, presented to the aforementioned Governor General; and the letters of those Gentlemen to Bahadoor Beg Khan.

In this case it is impossible that Khajah Bahadoor Beg should have held the estates as agent for Aulum Beg. We pray the Court to consider that the word *mutrookah* is defined to be the property left by a person at his decease. But the *altumgha* estates were during the life time of Aulum Beg alienated by him; and therefore cannot be included amongst his property, or sued for as such by his heirs.

In the case of Burkut Oollah Khan, *versus* Aboo Moohummad Khan, although no other heirs of Aulum Beg, the descendants of Bahadoor Beg, were parties to the suit, yet all Aulum Beg's heirs admitted the gift of the *altumgha* estates to Bahadoor Beg, and remained in possession of the estates they then held, as appears from their petitions and depositions filed in that case. The *ibranamah* has been approved by the Zillah and Provincial Court Judges, and in this Court a reference has also been made to the law officers regarding its admissibility.

1823.
Omar
Khan, v.
Moohum-
mad Khan
and others.

It would be superfluous for us to advance any thing further.

The Officiating Judge (W. Dorin) after maturely weighing the pleas urged in the above petition, recorded his opinion on the 13th of January 1823 in the following terms:

"I have considered the petition presented for a review of the decree in the cause Omra Khan (son of Aulum Beg) appellant, *versus* Aboo Mahomed Khan, Ameer Khan and others, respondents. The petition for review is presented by these two persons, Aboo Mahomed Khan and Ameer Khan, the first the son of Bahadoor Beg, and the second the son of Omar Khan.

There certainly is a difference between the contents of the Persian decree of the Patna Council bearing date in the *Fuslee* year 1184, or 1777 A. D. and the English abstract, or version of it, as given in the extract from the Patna Council's proceedings now put in. The material variation is, that the Persian decree has the important words that the *altumgha* estate was to be given over to Bahadoor Beg "*on behalf of Aulum Beg.*" The Persian decree seems to me undoubtedly authentic; and that decree I must follow. Besides, if the decree meant that the *altumgha* should be either adjudged to, or conferred on Bahadoor Beg, for his (Bahadoor Beg's) use and benefit, why did it provide that the widow was for life to be paid the produce of her legal share of it as an heir, viz. a fourth?—Of that part of the decree there can be no possible doubt.

I infer that it must have been meant Bahadoor Beg should take possession, or rather keep possession, as manager, on the part of Aulum Beg, and pay the widow as directed.

An objection might be urged (which however has not been urged by the petitioners) that in 1777 the Provincial Council should have first referred the question to the committee of revenue at Calcutta, under an order of Government bearing date the 12th of January 1774, which says, that in adjudging *lakhiraj* land beyond 1,000 rupees produce *per annum*, the Provincial Councils were, previously to final judgment, to refer for approval to Calcutta.

It is probable the acts of the Provincial Councils may not have been always very regular as to form.

The petitioners have now given in what they term the original *purwanna* of the Council (not the Supreme Council it appears) but the Provincial Council of Patna bearing date a few days after the decree, and apparently conferring the *altumgha* on Bahadoor Beg, with the signature of one member of the Council, *William Young*. And this apparently agrees with a notice in the English proceedings. If such a document was really given, it must, I think, have been meant that Bahadoor Beg was to be

1823. looked on as the man of business, the manager of the *altumgha*. It is clear, beyond a doubt, that the Provincial Council had no authority to confer the *altumgha* on Bahadoor Beg. If the *purwanna* be looked on as a *sunnud* of succession, such could only have been given by the Supreme Council, under an order of Government bearing date the 8th of February 1775, to the effect that, for *lakhiraj* land beyond 100 rupees annual *jumma*, *sunnuds* of succession were to be taken out from the Council at Calcutta only.

Omar
Khan, v.
Moolum-
and Khan
and others.

As to the alleged deed of renunciation (*ibranamah*) by Aulum Beg, bearing date in 1195 *Fuslee*, (of which they now profess to have brought the original) why should such a deed have been executed by Aulum Beg in 1195 F. S., if in 1182 F. S., the *altumgha* was either decreed to Bahadoor Beg, one of his sons, or conferred on Bahadoor Beg? And if Aulum Beg never succeeded to the *altumgha*, but was (as alleged) excluded from the first, how does it happen that certain *mokurreree* arrangements of 1195 are attributed to him, and stated as the foundation of *hibehnamehs* by Bahadoor Beg in 1202, after Aulum Beg's death?

The argument urged as to the probability of Aulum Beg (like other instances quoted) having resigned in favour of one son, does not seem very forcible. The main argument originally urged was, that he never acquired any interest in the *altumgha*, and had none to resign.

The same may be said of the argument as to the expediency of nondivision of land; viz. that it will ultimately be divided into nothing. Our system prescribes continual division. With the question of policy the Courts have nothing to do.

The idea that *altumgha* is not property, and inheritable property, like a man's other estate, is directly negatived by our regulations. What was held regarding *altumgha* will be seen so far back as the 29th of June 1784, in the resolutions of Government, in consequence of which the office for the registry of alienated lands in Behar, was instituted.

I see no sufficient reason for not admitting the authority of the *purwanna* of Mr. Bushby (the superintendent of the above office) bearing date the 21st of April 1785, (1192 F. S.) and reciting that Aulum Beg had till then been the holder of the *altumgha*, since the decease of Shahbaz Beg.

I still therefore infer that Bahadoor Beg was only manager. In the suit regarding the personals, which was appealed to the Sudder Dewanny Adawlut in 1803, he appeared on account of himself and brothers. Though this does not prove he was also an agent in regard to the *altumgha*, still it makes it not improbable that he was so.

There is, as far as I can discover, no proof at all of separate adverse possession, *bonâ fide* or *malâ fide*, beyond twelve years before Omar Khan came forward. He came forward as an *Oozrdaṛ*, or objecting party, in the first of these two suits, in the *Fuslee* year 1219; though this his own suit, (decided at the same time as the other) was not brought till the beginning of 1223. There would seem to have been a *dikhil kharej*, or change of names, at the Collector's office, so late as 1209, Bahadoor Beg's name being then put out and

Received the following *arree* from Cazeé Mahomed Sady, the head Cazeé of the city. 1823.

"In pursuance to your orders to me and the Muftees to make an enquiry into the state of the effects of Shalhbaz Beg Khan deceased, said to have been privately carried away from his house, and embezzled, and to call upon the slave women for that purpose, we have repeatedly sent people to the widow, demanding that the slaves may appear before us, but she will not pay the least attention to it, and bircarras are now *mohussil* over her. Patna consultation, April 3, 1777.

"Agreed, that as the Board have thought proper that such an examination should be made, they do not now suffer their orders to be disputed; and that to put an end at once to this affair, which has been already so often brought before the Board, a guard of sepoy to be placed over the widow, not to suffer any person to have intercourse with her till the slave women are given up. As this appears from the following opinion of the head Cazeé to be conformable to the Moosulman law."

From the Cazeé Syed Moohummud Sady.

"Nadira Begum wrongfully keeps to herself, and will not produce the slave women of her deceased husband, Shalhbaz Beg Khan, who constitute a part of the demised's divisible property, and are acquainted with the disposal of the other effects. The reigning power therefore should send in to her reputable women, as *Ameens*, to bring them out by force; and it has ever been customary for reigning power to lay restraint upon and confine any refractory person, to procure the right of another, that he may not lose it."

Chief's Minute.—"The Chief acquaints the Board, that notwithstanding the guard of sepoy placed over the widow of Shalhbaz Beg Khan, to oblige her to deliver up the slave women as minted in consultation 3d of April, she has not yet thought proper to comply; but now represents that these women are not slaves, but the lawful concubines of her late husband, which puts it out of her power to suffer them to appear in public. He further begs leave to add his opinion, that Gyrut Beg and the other persons now under confinement, should be no longer kept from their trial, but be delivered over to the Foujdarry Court without delay; and that the guard stationed over her, to oblige her to deliver up the slave women and papers in her possession, having failed of effect, should be taken off till the trial for forgery be finished." Patna consultation, May 5, 1777.

Messrs. Golding, Maxwell, and Bird coincided with the Chief in the above opinion, that Gyrut Beg, &c. should be sent to the Foujdary Adawlut, and that the guard should be removed from over the widow.

Mr. Young thinks that those persons who are now in confinement upon a charge of having secreted the effects of the late Shalhbaz Beg Khan ought not yet to be delivered over to the Foujdarry Adawlut to take their trial for the forgery, as the original intention of their confinement has not yet been fulfilled, namely, to ascertain by such evidences as were to be brought, what effects had been secreted, and that should they be now given up to that Court, we shall no longer have authority to oblige them to make restitution. In respect to the guard of sepoy stationed over the widow of Shalhbaz Beg, with a view to oblige her to deliver up the women acquainted with the manner in which the effects were said to be secreted, and to whom entrusted, also to enforce the delivering up the seal of the deceased, and the *sunnuds* of the *altumgha*, as neither of those purposes have been accomplished, he thinks it should not be withdrawn. Mr. Young has further reasons to urge in support of his opinion on both these heads, which he will take another opportunity to deliver at large.

The majority being of opinion that Gyrut Beg, &c. should be delivered over to the Foujdarry Adawlut to take their trial for the forgery, and that the guard should be for the present taken off the widow.

Ordered, it be accordingly done.

True Extracts,
(Signed)

HOLT MACKENZIE,
Sec. to Government.

Territorial Department, }
14th Feb. 1822. }

1823.

Jan. 14th.

DEBNATH MUJMOOADAR, Appellant,

versus

KISHENPERSHAD GOOEEN, Respondent.

A deed having been declared inadmissible by a zillah decree, from which an appeal was preferred, but subsequently withdrawn by *razeena mah*, held that the production of such decree is not sufficient to preclude enquiry into the authenticity of the deed in a subsequent suit.

THIS was a suit instituted by Ramgopaul Mujmooadar, in the Beerbhoom Zillah Court, on the 28th of June 1814, against the respondent, to establish his right to assess thirty-two beegahs and nineteen biswas of land, at the rate of 47 rupees annually. The land was situated in Dwarkanathpoor, and the defendant claimed to hold it at a fixed *mokurreree jumma*. Suit laid at 141 rupees, three times the yearly *jumma*.

The plaint set forth, that the plaintiff purchased the lot in which the lands in dispute were situated, in the name of his son Debnath Mujmooadar, and obtained possession; and that the defendant, who rented 32 beegahs 19 biswas of him, the *jumma* of which, according to the pergunnah rates, amounted to rupees 47, had for several years paid only a small portion of revenue, and had refused to come to a settlement or execute an engagement; that in consequence of this, the plaintiff served a notice on the defendant, who replied that he held the thirty-three beegahs of land at a fixed annual *jumma* of 10 rupees, 8 annas, and that he had paid rent at that rate from the year 1175 to 1220, B. S., and had the deed in his possession which conferred the tenure upon him; that after the defendant was ejected from the above land, the case came before the Court in 1206, B. S., and the Judge declared the deed produced by him to be inadmissible, on the ground that no mention whatever was made of the defendant's *mokurreree* tenure in the settlement papers in the Collector's office; and as the defendant had been in possession of the lands since 1208, B. S., and refused to pay rent according to the pergunnah rates, the plaintiff now sued for redress.

The defendant, in reply, stated that the plaintiff had bought a portion of Dwarkanathpoor at public sale, under the fictitious name of Ramkanth Mookurjeah, and had ousted him in 1206 B. S., from thirty-three beegahs of land, which he held as a *mokurreree* tenure; that upon this he brought an action against the plaintiff's agents for dispossession: that the plaintiff also sued him for balance of rent in the Zillah Court, where his claim was dismissed and a decree passed in his (the defendant's) favour by the Register; that, however, when the plaintiff, on appeal to the Judge, obtained a decree, he (the defendant) appealed to the Calcutta Provincial Court; that Ruttee Kanth was sent by the plaintiff to him, and executed a deed setting forth that the *jumma* of the above thirty-three beegahs of land should be fixed at 10 rupees, 8 annas, and the dispute was accordingly amicably adjusted; that the claim now preferred by the plaintiff *de novo* was not cognizable under section 16, regulation 3, of 1793; that he (the defendant) had really held the lands in question on a *mokurreree* tenure at a fixed rent of 10 rupees, 8 annas, since 1176, B. S., and had, down to the present time, for a period of 47 years, continued to pay rent at that rate; that the original *sunnuds* of 1176 and 1196, B. S., granted by

former zemindars and bearing the signature of Mr. Keating were extant: that the circumstance of the *mokurreree* tenure not being mentioned in the settlement papers in the Collector's office could not affect his (the defendant's) title, inasmuch as they were not signed by any government officer, and as the plaintiff was a servant in the Collector's office, he had fabricated those documents so as to suit his own views.

1823.

Debnath
Mujmoona-
dar, c.
Kishenper-
shaud
Gooeen.

On the 30th of December 1815, the Register of the Zillah, in deciding the cause, observed that the defendant's statement, with regard to the *jumma* and land in dispute being held by him as a *mokurreree* tenure, was not true, and that the *sunnuds* produced by him were inadmissible and not entitled to credit; and as it appeared from the report of the *aumeen* appointed by the Court, and the rent-roll produced by the plaintiff, that the defendant was in possession of 29 beegahs, 19 biswas, 10 gundas, 3 cowries of land, the *jumma* of which, according to the *paekusht jummaabundee*, amounted to 33 rupees, 8 anas, 13 gundas, he passed a decree directing that the plaintiff should receive an annual rent of 33 rupees, 8 anas, 13 gundas, for the above 29 beegahs, 19 biswas, 10 gundas, 3 cowries of land, and should give a *pottah* to that effect; providing, at the same time, that in case the defendant should refuse to take such *pottah*, the plaintiff should be at liberty to make a settlement with any other person according to the *pergunnah* rates. The costs of suit were made payable by the defendant.

The defendant appealed to the Judge; and the plaintiff was succeeded on his death by Debnath Mujmooadar. In consequence, however, of the Register being appointed Judge of the above zillah, the case was transferred to the Calcutta Provincial Court, under section 14, regulation 2, of 1805.

On the 30th of December 1819, the Second and Acting Judges of that Court passed a decree to the following effect:

It appears from a copy of Mr. Keating's note, that he considered the *mokurreree sunnud* to be genuine; and there is therefore no doubt that the lands in dispute were held by the defendant as a *mokurreree* tenure. The documents produced by the respondent from the Collector's office, purporting to have been filed by former zemindars, for the purpose of invalidating the defendant's *mokurreree* tenure, are inadmissible; inasmuch as their authenticity has not been proved, and even if they had been authenticated, they do not affect the present case. It appears from the *ikrarnamah*, or written acknowledgment produced by the appellant, dated the 17th of *Bysakh* 1208, B. S., and signed by Rutteekunth, a former talookdar, that the appellant, on his *mokurreree sunnud* being nullified by the decision of the Zillah Judge, on a former suit, appealed to the Provincial Court, but that afterwards the dispute was amicably settled, and an *ikrarnamah* executed by the said Rutteekunth (which was duly registered) specifying that the lands in dispute should be held by the appellant as a *mokurreree* at a *jumma* of 10 rupees, 8 anas, and a *razeenamah* was filed in the Provincial Court on the basis of the above acknowledgment, that the lands were *mokurreree*. It appears also from the two other documents, one dated 19th of *Magh* 1196, bearing the seal of

1823. Mahomed Zuman Khan, and the other dated 5th of *Sawun* 1176, B. S., bearing the seal of Mahomed Ussudoozuman Khan, and signed by Mr. Keating, that the above lands were the appellant's *mokurreree* tenure, and that an *ikra namah* to that effect had been executed by Rutteekunth. The appellant's claim therefore to the *mokurreree* tenure is not barred by the decree passed by the Judge on appeal in a former trial, declaring the above *sunnuds* to be null and void. They therefore reversed the decision of the Register, directing the respondent's claim for an encrease of rent to be dismissed, and the costs of both Courts to be made payable by him.

Debnath
Mujmooa-
dar, v.
Kishenper-
ghaud
G.

Debnath Mujmoodar preferred a petition for a special appeal to this Court, which was granted, on the ground that the *mokurreree sunnuds* produced by the respondent had been disallowed and declared inadmissible by a former decree. The case accordingly came to a hearing before the Third and Officiating Judges (S. T. Goad and W. Dorin) who having perused the pleadings of the parties, and all the documents connected with the case, saw no reason for altering the decree of the Provincial Court, which was therefore affirmed and the appeal dismissed with costs.

1823.

BHOWANEE BUKSH, (Pauper), Appellant,

versus

KHEIT SING, Respondent.

Jan. 20th.

THIS was a suit preferred on the 1st of November 1813, in the Zillah Court of Allahabad by the appellant, *in formd pauperis*, for the recovery of one-third of talook Boondee, the yearly *jumma* of which was stated to be 1,500 rupees. The plaintiff merely set forth that the plaintiff, together with Sohroo Sing, had formerly brought an action *in formd pauperis* for two-thirds (each a third) of talook Boondee against the defendant, that their respective rights were then established by the evidence adduced; but that they were nonsuited in consequence of a petition of the defendant in bar of the plea of pauperism being admitted; that as now the pauperism of the plaintiff had been established to the satisfaction of the Court he renewed the suit on his own behalf.

The defendant, in reply, urged that the petition of the plaintiff did not set forth whence his rights arose, whether in consequence of inheritance, or purchase, or otherwise; that consequently it was not incumbent on him to file a specific reply; that the former cause instituted by the plaintiff had not been investigated, but was nonsuited on his pauperism being not established. The plaintiff in replication, stated that Busawun Sing, the ancestor of both parties, had six sons; two of whom died without issue, Thakoor Sing his (the plaintiff's) father, Dureao Sing father of the defendant, and Khooshal Sing the father of Sohroo Sing, another sharer, and Mulhul Sing whose son had died leaving a widow; that although the whole village had always remained in the name of one brother, yet that the other three had always shared the produce of the estate after deducting the Government revenue, living together,

In a suit by a joint proprietor to separate possession of his share, the defendant urging that he had exclusive possession long before the Company's Government, without being able to prove exclusive right, held that the rule of limitation does not apply.

as their father had done before, without any dispute arising concerning the division of their respective shares. 1823.

That when in the year 1212, F. S., the defendant obtained a decree against Baboo Ram Shewuk Sing, farmer, in the Zillah Court, although the plaintiff assisted the defendant in managing the suit and lived with him; yet, through ignorance of the regulations, he neglected to insert his name in the petition; that the defendant in the year 1216, F. S., began to quarrel with the plaintiff, and an order was passed by the Board of Commissioners, upon a petition presented to them by the plaintiff for his share of the zemindaree, that he (the plaintiff) should institute a suit in the Civil Court, in consequence of which order the present suit was instituted. The defendant, in rejoinder, denied the truth of the plaintiff's assertion respecting the division of the produce of the estate. He stated that Busawun Sing, the ancestor of the parties, who was proprietor of the talook Burdeha, and of the talook Boondee, in pergunna Secundar, seeing the number of his children and brothers, in order to settle their contentions, gave to each of his heirs one or two villages, and put them in possession of their respective allotments; that the village of Munhor in Burdeha and the mouza of Oodepore were given to the father of the plaintiff, and the talook of Boondee to the father of the defendant; other villages being given to the other heirs; that in the year 1210, F. S., when Chumur Sing, Runjeet Sing, and Busawun Sing, divided the talook Burdeha into three parts, the villages belonging to that talook were taken from all of them; and the plaintiff being content with mouza Oodepore, which he then possessed, made no objection to the appropriation by them of mouza Munhor; that now the plaintiff sued for possession of lands to which he had no title whatever; and in order to shew the futility of his claim, and the truth of the defendant's assertion respecting the partition of the villages, the length of time during which the disputed property had been in the defendant's possession was sufficient evidence, and moreover proved an insuperable bar to the present action. That if the plaintiff had a right to any part of the talook, when a suit was instituted by Sheik Nisar Ali against the defendant for possession of it, which suit was decided in favour of the defendant, the decree would have contained some mention of the plaintiff's right; and finally, that as neither the plaintiff nor his ancestors ever possessed any part of the disputed talook, the claim at present brought forward was nugatory and unworthy of attention.

On the 11th of May 1815, the case having been gone through by the Acting Zillah Judge, it appeared to him that from the testimony of the witnesses, with the exception of two years, during which the father of the plaintiff was in possession, and since which thirty-five years had elapsed, the disputed talook was never in the possession of the plaintiff or of his father; and that consequently the action could not be entertained. He therefore dismissed the suit with costs against the plaintiff, to be levied on any property which might be proved to belong to him. The plaintiff on this appealed to the Benares Provincial Court, and on the 27th of January 1819, the Fourth and Senior Judges of that Court, in opposition to the opinion of the Second Judge, concurred in thinking

Bhowanee
Buksh, v.
Kheir Sing.

1823. thrt the time which had elapsed since any possession was proved, and this action had been instituted, was a sufficient bar to its admission; and they therefore dismissed the appeal, affirming the decision of the Judge of Allahabad of the 11th of May 1815. The costs in both Courts were given against the appellant, to be realized from any property he might be proved to possess.

Blowance
Biksh, v.
Kheit Sing.

The appellant petitioned for the admission of a special appeal from this decision, *in forma pauperis*; and this was granted by the Court of Sudder Dewanny Adawlut on the 29th of July 1820.

The case was brought before the Third Judge (S. T. Goad) who, after hearing the whole of the evidence adduced, recorded his opinion that the plea urged by the respondent as to the division of the property by Busawun Sing during his life time had not been proved, no mention of it even having been made in the reply of the defendant in the former case, in which the plaintiff was nonsuited by the Judge of Allahabad; and that the assertions of the respondent, that mouza Oodepore, which was in the possession of the appellant, was part of the property of Busawun Sing, had not been established. On these grounds, and for the reasons given by the Second Judge of the Court of Appeal in his proceeding dated the 12th of December 1818, (which were in substance that the estate had been admitted to be ancestral, that no division had been proved to have taken place, and that the fact of the name of the defendant alone being registered as proprietor could not affect the rights of the other *putteedars* or joint proprietors) he declared his judgment that the decisions of the Zillah Court of the 11th of May 1815, and of the Benares Court of Appeal, dated the 27th of January 1819, should be rescinded; and that the appellant should obtain one third of the talook of Boondee; the respondent paying him the proceeds thereof from the time of his filing the first petition on which was nonsuited; that is, from the 6th of June 1808, up to the date of his receiving possession; and that the costs of the three Courts should be made payable by the respondent. The case was ultimately brought forward before the Officiating Judge (W. Dorin) on the 20th of January 1823. His opinion was to the following effect: It appears that the respondent admits the disputed talook to have been the hereditary property of Busawun, the common ancestor of both parties. He has not sufficiently proved that the appellant ever received any compensation in lieu of his share of that property, or that he had forfeited his right to it; and as the territory of Allahabad came into the possession of the Company in the year 1210, F. S., and this suit was instituted in the year 1216, F. S., sufficient time has not elapsed to render the suit of the appellant inadmissible. On these grounds a decree was passed agreeably to the opinion of the Third Judge, and the decisions of the Zillah Court of Allahabad of the 11th of May 1815, and of the Court of Appeal of Benares of the 27th of January 1819, were rescinded. It was ordered, that the respondent should deliver over possession of one-third of the talook Boondee to the appellant, paying him the proceeds of the same from the time of his filing the first plaint, which was nonsuited, to the date of his entering on possession. The costs of the three Courts were made payable by the respondent.

UDAN SING, and TEJ SING, (a minor, through his guardian, 1823.
the above named Udan Sing), Appellants,

versus

Jan. 23rd.

KANTH CHUND PANDE, (guardian of BEHAREE LALL, a
minor), and GOPAL CHUND, Respondents.

THIS was an action first brought by the respondents, the original plaintiffs, on the 9th of June 1815, against the appellant Tej Sing, and Jowahir Sing a former defendant, in the Patna Provincial Court for 14,391 sicca rupees, 5½ anas, on account of a debt, with interest, lent on a deed of *bye-bil-wuffa* or conditional sale, and the amount of three times the rent of half the talook of Sultanpore, &c. as detailed in the plaint, and afterwards, agreeably to an order of Court under date the 20th of January 1819, an amended plaint was filed for the recovery of 18,159 rupees, 15 anas, on account of the value of the lands in dispute and the amount of the debt. It was set forth in the plaint, that Jowahir Sing, proprietor and Malgoozar of Dhoonee and other villages in zillah Sarun, borrowed of the plaintiffs the sum of 9,896 rupees, in order to make an advance on account of the farm of Ruhimpore Roonea and other mouzas, and for the purpose of defraying half the purchase money of talook Sultanpore, at an interest of one *per cent per mensem*; that on the 2d of Poos 1817, F. S., he gave to the plaintiffs an engagement stating that they should retain, as a voucher of the above debt having been incurred, the papers relative to the lease of the farm of half Ruhimpore Roonea and Durveshpore Deara, and those relating to the purchase of half Sultanpore and Jeewuntpore Muhdawan, and that he (Jowahir Sing) would repay the above sum with interest at the rate of one *per cent per mensem* in four years, and receive back the title deeds; that in case he should not be able to repay the money within that time, he should lose the rights which accrued to him from those documents, and that the said rights should pass over to the plaintiffs; that he would give the papers relative to the purchase of Sultanpore to the plaintiffs after registering them; that accordingly when this was done he gave to the plaintiffs the title deeds relative to that property, together with the documents relative to the farm of Ruhimpore; that in the year 1218 F. S., he (Jowahir Sing), after purchasing Durveshpore in the name of his father Munsa Ram, borrowed 1,800 rupees to pay for it; afterwards, in 1219, 500 rupees to pay his rents, and also 335 rupees from the houses of Jeewun Doss and Kanth Chund and the plaintiffs; and entered into a bond to pay those sums, together with those specified in the deed of conditional sale; that, after the expiration of the term agreed on, the plaintiffs filed a petition in the Patna Provincial Court (agreeably to the 17th regulation of 1816) for 18,159 rupees, 15 anas, the sum due to them on account of the deed of conditional sale, with interest; that on the 8th of February 1814, the Judge of that Court caused a notice to be served on Jowahir Sing to this effect, that after a deduction of 315 rupees, which was over and above the sum specified in the written obligation, he should pay, within one year, to the plaintiffs, 17,824 rupees, 7 anas, or deposit the same sum in the Court; on his failing to do which the conditional sale of

In a case where money was borrowed and a bond executed for the payment thereof at the legal rate of interest, (12 per cent) and afterwards another bond executed for the payment of one-half per cent, as *mihnutana*, the Court held that no part of the original debt was recoverable even though no illegal interest had been received.

1823. Sultanpore should become absolute; that Jowahir Sing's receipt of this notice is among the records of the Court; that he, nevertheless, neither acted according to the rules laid down in regulation 1, 1796, and 17, 1806, nor urged any excuse for not doing so; but that Oudan Sing, his brother, who still lives with him, although he had written letters promising to pay the money, and had given, as well as his father Munsa Ram, his testimony to the bonds entered into by Jowahir Sing, filed two petitions in the above mentioned Court, one on his own part, and the other on the part of his son Tej Sing, a minor, alleging excuses for not paying the money; that the Judge, after reading these petitions, refused to give possession on the strength of them, and ordered the plaintiffs to institute a regular suit for the possession of the above talooks, and that the claim of the plaintiffs therefore now was, that they might be put in possession of half of the talooks of Sultanpore and Jeswantpore Muhdawan, in pergunnah Shahpore Ummeer, and of the farm of half mouzas Ruhimpore Roonea, &c. thrice the *jumma* amounting to 3,984 rupees, or that they might receive the money due to them agreeably to the obligations executed in their favour, and the account books of the houses of Jeewun Doss, &c. with interest up to the 30th of *Bysakh* 1222, F. S.

Oudan Sing
and Tej
Sing, v.
Kauth
Chund
Pande and
another.

Oudan Sing, in reply, denied receiving the money, and executing the alleged obligations, as also having written the letters to the plaintiffs, promising to pay the money. He urged, that the deed of conditional sale was executed in favour of Beharee Lall, a minor, who could not have paid so much money; that the plaintiffs had also allowed it to escape them, that the name of Jowahir Sing in the papers relative to Sultanpore and the farm of Ruhimpore Roonea, &c. had been merely substituted; that this therefore was an extraordinary case, where both the plaintiffs and defendants were substitutes for others; that, moreover, the money mentioned in the document relative to Ruhimpore, was paid in the year 1216 F. S., and the purchase money of half Sultanpore in *Jeth* 1216; that the deeds of sale were written in the same year, and eight months before the second of *Poos* 1217, F. S., the date of the acknowledgment brought forward by the plaintiffs; that Jowahir Sing therefore could not have borrowed the money to make the advance abovementioned; that the fact was, that he (Oudan Sing, the defendant) sent to Jowahir Sing different sums of money, to enable him to buy Sultanpore and Dhoomee, &c. The money was sent in drafts from Chuprah and Moorshedabad, and with this he bought the lands abovementioned, as well as others in Sarun and Behar; that it was most probable Jowahir Sing did not give any acknowledgment to the plaintiffs; that if he did so, he must have done it with a view to defraud him (Oudan Sing), and to establish the right of property in himself, by making his own name appear as proprietor; that, however, the transaction was of no consequence, as the name of Jowahir Sing in the deed of sale was a substituted one, and as he (Oudan Sing) was the real proprietor of the lands, and had had possession from the time of the sale; that moreover the purchase of Ruhimpore Roonea and Durveshpore Deara was conducted in the name of Munsa Ram, and that as the plaintiffs did not object at that time, they could not now bring forward a claim to

them; that besides, the obligation alleged to have been entered into by Jowahir Sing is for a debt, no mention was made in it of buying or selling; and there was, therefore, no reason for supposing it to be a deed of conditional sale, so as to come under the 17th regulation of 1806; that the plaintiffs also affirm that at the time of its execution, he (Oudan Sing) was at Moorshedabad, from which place, after a few years, he returned to his own country; that it was then difficult to suppose that his name should have been affixed to it as a subscribing witness; and that, finally, since the year 1210 F. S., or during the last 12 years, his affairs have been separated from Jowahir Sing's, and that Jowahir Sing receives from him the sum of 20 rupees *per mensem* for his services.

1823.

Oudan Sing
and Tej
Sing, v.
Kanth
Chund
Pande and
another.

Tej Sing, a minor (son to Oudan Sing), in his reply, set forth that the obligation brought forward by the plaintiffs was null and void; that his grandfather Munsa Ram bought Ruhimpore Roonea and Durveshpore Dearsa on the 22d of *Jeth* 1218, from Mirza Imdad Ali for the sum of 16,001 rupees, and made over to him by a deed of *hibba-bil-iwuz*, or gift for a consideration, one-half share of the same in the year 1220 F. S., by right of which he is now in possession of it, and has in his possession also the deed of sale under the seal of the Muftee and Register as they were given to him by his grandfather; neither Jowahir Sing nor Oudan Sing having any right to the property; that although the plaintiffs, jointly with Jowahir Sing, may have forged documents, they cannot be considered valid by the Court, nor in any way prejudice his (Tej Sing's) right. That if the documents were genuine, the plaintiffs would have objected when Jowahir Sing received back the money advanced on account of the farm, and when his (Tej Sing's) grandfather bought the land; and, lastly, that the demand of the plaintiffs, which is grounded on the alleged obligation, is inadmissible. Jowahir Sing, in reply, denied having received the sum of 335 rupees, part of the demand of the plaintiffs; he affirmed that the plaintiffs had instituted a single suit on account of documents bearing dates of different months and years, as well as of the accounts of different mercantile houses, which have no relation whatever to each other, which mode of proceeding was forbidden by the regulations: that he (Jowahir Sing) first received from Kanth Chund Pande 5,000 rupees, in order to make an advance on account of the farm of Ruhimpore Roonea and Durveshpore Dearsa; that in return, he executed a bond for 6,000 rupees, in the name of the father of Kanth Chund, in which was included a sum of 900 rupees, which he before owed to Kanth Chund; that he promised to pay two *per cent* interest *per mensem*; and to that end entered into two separate agreements, the one to pay one *per cent* interest, and the other one *per cent* under the name of *mihnutana*; that in part of this he had paid 600 rupees, and had also received from the same individual 300 rupees, in order to pay for the talook Sultanpore; for which debt he had executed an obligation in the form of a bond for the aggregate of the sums borrowed, and including interest to that date, altogether for 9,896 rupees, in the name of Beharee Lal and Gopal Chund his sons; and a separate document for interest at half *per cent*, to be considered as *mihnutana*; the creditor at the same time promising to return the

1823. **Oudan Sing and Tej Sing, v. Kanth Chund Pande and another.** former bond, but as he did not eventually return it, he (Jowahir Sing) only gave him the deeds relative to the advance on account of Ruhimpore, &c. and none of the other papers mentioned in the obligation; that afterwards, when Mirza Imdad Ali expressed to him a wish to sell the disputed lands, on the 22d *Jeth* 1218, F. S., he (Jowahir Sing) borrowed 1,800 rupees from Kanth Chund on a separate bond, and agreed to pay it by other means, and bought the abovementioned mouzas in the name of his father Munsa Ram; that on the 30th *Bysakh* 1219, F. S., he again requested a loan of 500 rupees from Kanth Chund; but after taking from him a bond for that sum, he (Kanth Chund) retained the money on account of the interest mentioned in the former bond as *mihuntanz*, but that he (Jowahir Sing) received none of it; and that Kanth Chund gave him 35 rupees, in order to enable him to have other documents drawn up; that these documents were prepared but not used; that as to the assertion of the plaintiffs, that they had filed a petition agreeably to regulation 17, 1806, and that a notice had, in consequence, been issued, he (Jowahir Sing) knew nothing of it, nor how a receipt for it could have been produced in Court.

On the 3d of March 1819, the case was brought before the Provincial Court, and it was held by the Acting Judge, that from the contents of the written obligation under date the 2d of *Poos* 1217, F. S., it did not appear to be of the nature of a conditional sale, and that it could not have that effect, because when Jowahir Singh borrowed money, entering into two new bonds for the aggregate, the conditions of the first bond became modified, and the lands mentioned in the document (by regulation 17, 1806) could not be sold; that consequently the plaintiffs had no right whatever to the possession of them; but that, from the documents and depositions, and the answer of Jowahir Sing, they appeared to be entitled to the money lent with interest; that although Jowahir Sing denied receiving a part of the loan, namely, 500 rupees, on account of one of the bonds; and asserted that the plaintiffs took illegal interest, he nevertheless himself acknowledged that he had executed that bond, and the witnesses prove him to have received the money; that, moreover, it was by no means proved that the plaintiffs received, or that any mention was made of illegal interest; that, as appeared from the circumstances of the case, Oudan Sing was aware of the transactions carried on with the plaintiffs, he having been witness to two of the bonds executed by Jowahir Sing, and having written letters respecting the discharge of the debt due to them, and the lands bought by Jowahir Sing being in point of fact Oudan Sing's property and in his possession; that it was just that the money borrowed by Jowahir Sing to buy those lands should be paid by Oudan Sing; that, moreover, as the advance made was used in buying the above lands, they could not be released without the payment of the debt due to the plaintiffs. A decree therefore was passed, that Oudan Sing should pay to the plaintiffs the sum of 12,198 rupees principal, and 11,980 rupees, 5 anas interest, up to the date of the decree; in all 24,178 rupees, 5 anas; that in the event of his failing to do so, it should be realized in the first place from the sale of Sultanpore, and should any part remain unpaid after that sale, from the sale of Ruhimpore

Roonea and Durveshpore Deara. The costs were made payable by 1823.
 Oudan Sing. It was further provided, that should Jowahir Sing
 institute a suit for his share, and a decree be given in his favour, Oudan Sing
 he would be liable to pay his share of the sum awarded by the decree and Tej
 in proportion to his interest in the property, and, on his failure to Sing, v.
 do so, that Oudan Sing should be at liberty to sue him for the same. Kanth
 Chund

Oudan Sing appealed to the Court of Sudder Dewanny Adawlut, Pande
 as also did Tej Sing, his ward, through him. Jowahir Sing filed a and ano-
 petition praying that his name might be admitted as an appellant ther.
 also, but he neglected to attend the Court. The case was brought
 finally to a hearing on the 23d of January 1823, before the Third
 and Officiating Judges (S. T. Goad and W. Dorin). All the papers
 having been read at different times, the opinion of the Court was
 finally delivered as follows: In the transaction between the parties
 an interest of one *per cent* was originally stipulated, and
 afterwards a separate obligation was executed for interest of eight
 anas *per cent per mensem*, under the name of *mihnutana*, in
 addition to the interest specified in the original bond, being more
 than is sanctioned by the 15th regulation of 1793; and by the 9th
 section of the same enactment, in the event of any underhand
 agreement being made to exact illegal interest and evade the
 regulation, on the application of the lender, no other order can be
 passed by the Judge than the dismissal of his suit. Although the
 illegal interest may not have been received, the right of the party
 stipulating to receive it, is nevertheless annulled by the stipulation;
 and in the present case, although no illegal interest may have been
 received by the plaintiffs, the reason of their forbearance is not
 apparent; and indeed, there is strong ground for suspicion, that in
 all the transactions between the parties some stipulation for the
 payment of illegal interest was made, either by a separate bond or
 by a deduction from the sum alleged to be borrowed, or by some
 other means. As therefore it appeared that an underhand agree-
 ment had been entered into for the payment of more than legal
 interest, it was deemed unnecessary to enter into the question of
 the rights of the parties, and it was held that no other order could
 be passed than the dismissal of the case. On the above grounds
 the decision of the Patna Provincial Court, under date the 3d of
 March 1819, was reversed, and a decree was given in favour of
 the appellants. The costs of both Courts were made payable by
 the respondents.

1823. MUSSUMMAUT SHUREEF OONISA, (Pauper), Appellant,

*versus*Feb. 5th. MUSSUMMAUT KHIZUR OONISA KHANUM, and others,
Respondents.

According to the Moo-hummud law, a man cannot marry his wife's sister, his wife being alive; but the second marriage will not invalidate the first, and according to the same law, the heirs being a widow, a mother, and a half sister, the property should be made into 13 parts, of which three belong to the widow, four to the mother, and six to the half sister.

THIS action was instituted by the respondents in the Dacca Court of Appeal on the 17th of September 1817, to recover possession of one moiety of certain talooks situated in pergunna Shaistanuggur, &c. the triennial assessment of which was stated to be 7,001 rupees.

The property, according to the plaint, left by the late proprietor, Kifayut Oollah Khan, who died in the year 1197, B. S., belonged to his heirs in the following proportions: A one ana share became the right of Ameena Khanum (one of the plaintiffs) in virtue of her being widow of the deceased; a seven ana share, the right of Kurm Ali Khan, her son, in virtue of his being son of the deceased; a three and half ana share, the right of Khizur Oonisa (another plaintiff), in virtue of her being daughter of the deceased; and a four and half ana share to Oomeid Oonisa, mother of Khizur Oonisa, partly as dower and partly as inheritance, in virtue of her being widow of the deceased. The plaintiff, Khizur Oonisa, kept her share along with that of her mother, in whose name the whole eight shares were registered, and after whose death her own (Khizur Oonisa's) name was substituted in the Collector's registry book as proprietor. The plaintiff, Ameena Khanum, kept her share along with that of her son, Kurm Ali Khan, who was registered as proprietor of the other eight shares. This Kurm Ali Khan died childless and unmarried, in the year 1222, B. S., and the plaintiffs being his mother and his half-sister were his sole lawful heirs. Notwithstanding this, a woman whose real name was Sooturee, who had eloped from her husband, and was living in a state of adultery with the deceased, claimed his property as his widow, calling herself Shureef Oonisa, whereas, in point of fact, the only persons who had any legal claim to the property were the plaintiffs, his mother, and his half-sister. As the Zillah Judge had put this woman into possession by a summary order, the plaintiffs now instituted this suit to recover their rights. The defendant, Shureef Oonisa, replied, by stating that she had been duly married to the deceased Kurm Ali Khan, who had settled on her the sum of 500 gold mohurs, and 3,000 rupees as a marriage portion, and in lieu of that sum had conferred upon her a moiety of his lauded property, conferring the other moiety upon her sister Zeenut Oonisa, who however relinquished the gift by reason of her having no children; that, previously to his death, he had bestowed the last mentioned moiety on Hingun Khan and Rujub Ali Khan, two minors whom he had affiliated, by reason of his not having had any children, taking from them a diamond ring in consideration of the gift. And that although one of the plaintiffs (Ameena Khanum) was entitled to one of the shares left by Kifayut Khan, as being his widow, yet that she had sold that share to her son, and could therefore now have no claim to it. The defendant, therefore, claimed the right of holding the contested land, one moiety as her own property

conferred on her by her late husband in lieu of dower, and the other moiety as guardian to the two minor donees. 1823-

This case came to a hearing on the 13th of April 1820, before the Senior Judge, and on an inspection of all the proceedings and evidence adduced, he recorded his opinion that there appeared to be two points at issue between the parties. Mussum-maut Shureef Oonisa, v. Mussum-maut Khi-zur Oonisa Khanum and others.

1st.—Although the execution of the deed of settlement in favour of Shureef Oonisa had been established by the evidence, yet the validity of that deed of settlement depended on the validity of the marriage of Kurm Ali Khan to Shureef Oonisa, it being contended that this Kurm Ali had married her sister also, by name Zeenut Oonisa, at the period when both their husbands were alive.

2nd.—Although a deed of gift had been drawn out in the names of Shureef Oonisa and Zeenut Oonisa, it becomes a question how far it should be held to be in force; as it appears from the evidence of the witnesses, that at the time of drawing out the aforesaid deed, Kurm Ali was frequently deranged from the effects of severe illness, and as afterwards they (the donees) both executed a deed of relinquishment in the year 1216, B. S., in the interval between that period and 1222, B. S., Kurm Ali retaining the entire management of his estate in his own hands, as far as regards the letting leases, the concluding sales, and the receiving rents.

To elucidate these points, the following questions were referred to the Officiating Mooftee of the City Court, the law officers of the Provincial Court being absent on duty at the time.

1st.—Should the deed of dower be held null and void in consequence of Kurm Ali Khan having married two sisters during the life of their husbands, or not?

2nd.—Is the deed of gift drawn out in 1216, B. S., in the names of Zeenut Oonisa and Shureef Oonisa valid, notwithstanding the subsequent renunciation of all claims founded upon such deed on the part of the donees, and the actual occupation and management of the whole property by Kurm Ali himself?

3d.—Is the deed of gift in favour of Rujub Ali and Hingun obligatory, notwithstanding the illness of Kurm Ali at the time such deed was executed?

The reply of the Mooftee was to the following effect:

Dower is one of the conditions of marriage, and therefore, on the completion of the marriage contract, is secured. In the case however of the marriage of Kurm Ali and Shureef Oonisa, the dower is not due, because the marriage itself was invalid. This defect in the contract arises from the illegality of marrying the wife of another man without the certainty of a previous divorce, which, in this case, no attempt has been made to prove, nor even has such divorce been directly or incidentally alluded to. Therefore the settlement made by Kurm Ali on Shureef Oonisa is null and void. It is, however, necessary to enquire, what is the legal consequence of marrying two sisters, supposing no other legal objection to have existed. It is unlawful, however contracted, whether by one or two contracts, but as far as dower is concerned the cases are different. 1st. If a person has married two sisters by the same contract, both of them on the dissolution of the marriage are entitled to a dower proportioned to their rank (*muhur-i-misul*),

1823. or the stipulated dower, whichever is least. 2nd, If they are married by two separate contracts, then the first wife will receive a dower proportioned to her rank, or the stipulated dower, whichever is least, on account of the dissolution of the marriage contract; but the second wife can obtain nothing, on account of the invalidity of her marriage contract. Thus the previous marriage of the former wife was valid, but becomes invalid by the supervention of the second marriage; and in an invalid marriage, a dower proportioned to her rank, or the stipulated dower, whichever is least, is obligatory. Hence, on this supposition, Shureef Oonisa is entitled to a dower proportioned to her rank, or the stipulated dower, whichever is least, and Zeenut Oonisa can claim nothing. The deed of gift of Kurm Ali, in the names of Rujub Ali and Hingun Khan, is legally a deed of sale. The granting possession of property, without a consideration, is gift; upon a consideration, is sale in all its properties; upon a conditional consideration, is a gift in the first stage only, that is, before the consideration for which the gift is made, has been received. This deed of gift is however upon an absolute, not a conditional consideration, and therefore it is legally a deed of sale, and a deed of sale is annulled by the accident of death; and consequently this deed of gift, which in the eye of the law is a deed of sale (supposing one of the donees to be dead), is annulled.

Mussum-
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v. Mussum-
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and others.

From the above *futwa* it did not appear that any opinion had been given as to the validity of the deed of gift in favour of Shureef Oonisa; but as it was evident that the deed of gift was never acted upon, that Shureef Oonisa had never taken possession of the property under it, but that, on the contrary, all claim to it had been renounced by her, it did not appear necessary that the law officer should be further consulted on this head. It appeared however requisite to enquire more fully into the following points: Whether Shureef Oonisa's husband was alive at the time that Kurm Ali brought her from her father's house, or any other place? What was the state of Kurm Ali's mind at the time of his executing the deed of gift in the names of Rujub Ali and Hingun Khan, and immediately before his death, and also how many days elapsed between the execution of the aforesaid deed and the death of Kurm Ali? What evidence had been adduced to prove the actual existence or death of Hingun Khan, whom the plaintiffs allege to be dead, and the defendants allege to be yet living?

As to these points, it appeared from the plaintiff's evidence, that Shureef Oonisa was sold by her father, in Baitool, to one Dhoolee a prostitute; that while with her she prostituted herself; that Kurm Ali took her from thence during the life time of Birmoollah her husband; and the husbands of her three sisters had not severally divorced them; that one or two months previous to his death, Kurm Ali was in a precarious state, and frequently insane; and that he was ill six months before his death; and that Hingun Khan died in 1223.

On the other hand, it appeared from the evidence of the defendants, that Kurm Ali brought Shureef Oonisa to his house one day before their marriage; that the deed of gift was drawn out in the names of Rujub Ali and Hingun, when Kurm Ali was in a per-

fectly sane state; that the property had actually been ceded to the donees, and was managed by Shureef Oonisa; but nothing was stated clearly as to whether Hingun was at that time living or dead.

1823.

Mussum-
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and others.

On considering the above summary of the evidence, it did not seem necessary to vary the questions before proposed to the Mooftee, or to make any further reference on points of law. In consideration, however, of the objections urged by the defendants to the *futwa*, and in order to ascertain its accuracy or otherwise from the law officers of Sudder Dewanny Adawlut, a copy of it was submitted to that Court; but as the Senior Judge of the Provincial Court had himself expressed no doubts as to the accuracy of the opinion, and only one of the parties had objected to it; and as it appeared that no question had been put to the Cazeer of the Provincial Court, the Dacca Court were informed in reply, that according to section 4, regulation 2, 1798, it was unnecessary to consult the Cazeer of the Sudder Court; but if the Senior Judge himself had any doubts respecting the answer of the Mooftee of the City Court, he should consult the Cazeer of his own Court: and in case of his opinion proving unsatisfactory, ultimate reference might be made to the law officers of the Sudder Dewanny Adawlut.

On receipt of the above reply, the Senior Judge deeming it unnecessary to postpone any longer the recording of his opinion, proceeded to give judgment in favour of the plaintiffs, observing that they alone appeared entitled to the property of Kurm Ali in right of inheritance, observing that it would have been necessary to enquire of the law officers to what share of the property each of the plaintiffs were entitled, had not this necessity been superseded by the circumstance of Ameena Khanum having presented a petition, stating that she had resigned to Khizur Oonisa her share (as wife of Kifayut Khan, father of the deceased Kurm Ali) of one ana share out of the moiety claimed; and whatever other share might be adjudged to her out of the remaining seven anas, in proof of which she filed a deed of gift to that effect. It was therefore ordered, that Khizur Oonisa should be put in possession of the entire property claimed in the plaintiff's petition, and that the defendant should pay all costs of suit. It was declared, however, that in the event of Ameena Khanum having other heirs, this decree should not be construed to affect their rights.

An appeal was preferred from this decree to the Court of Sudder Dewanny Adawlut, and the case was first heard by the Third and Officiating Judges (S. T. Goad and W. Dorin) on the 16th of November 1822, to whom it appeared, from the evidence adduced, that Shureef Oonisa was the legal wife of Kurm Ali, that the evidence brought forward to prove the sale of her by her father, after her marriage, to a prostitute, and her own prostitution, was wholly insufficient; whereas, that adduced on the opposite side to prove her marriage, and the settlement made upon her at the time, of a sum equivalent to 11,000 rupees, was in every respect deserving of credit; that all that was brought forward to prove the deed of gift (*i. e.* the deed of gift upon a consideration drawn out in 1216 B. S., in favour of Shureef Oonisa) was entitled to belief, and under

1823.

Mussum-
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Khanum
and others.

that she accepted one moiety of the property, the value of which is about 7,000 rupees, in lieu of her fixed dower or 11,000 rupees; that the deed of gift of the other moiety in the name of Zeenut Oonisa had by the confession of the appellant been resumed. The subsequent deed of gift alleged to have been drawn out by Kurm Ali a short time before his death in favour of Rujub Ali and Hingun Khan, whom he had affiliated, had not been registered; and the proofs of its validity did not appear to the Court sufficiently strong. The statement of the appellant that Ameena Khanum had sold her share of one ana in the estate left by Kifayut Khan, to her son Kurm Ali, rested solely on the evidence of witnesses, and was supported by no document whatever, and therefore Ameena Khanum had an undoubted claim to that one ana share. It was determined therefore, that after the subtraction of this one ana share for the aforesaid Khanum, and of one moiety of the property for Shureef Oonisa in virtue of the deed of gift in her name, the remainder of the estate of the deceased Khan should be divided among his heirs. As, however, it appeared that Shureef Oonisa and Zeenut Oonisa were own sisters, and that the latter was married to Kurm Ali by a separate contract, subsequently to his marriage with the former, it seemed necessary to put some questions to the law officers, and the trial was therefore adjourned.

On the 25th of January, a petition of Ameena Khanum, respondent, was presented by her Vakeel, setting forth her renunciation of the deed of gift, stated to have been drawn out by her in the name of Khizur Oonisa, alleging the above deed to have been a forgery, and praying that her claims on the contested property might be awarded her.

The following were the questions propounded to the law officers of the Sudder Dewanny Adawlut:

On the supposition that Kurm Ali married Shureef Oonisa, and afterwards Zeenut Oonisa her own sister, notwithstanding the defect in the second marriage contract, is the first valid, and is the dower recoverable? "

If a Moosulman dying leave a wife and mother, and an half sister, how should his property be divided, according to the law of inheritance?

On the 15th of January, the following answers were received:

Kurm Ali having first married Shureef Oonisa, and afterwards Zeenut Oonisa, own sister of Shureef Oonisa aforesaid, legally, the marriage of Shureef Oonisa, which was of a prior date, is valid, and renders the dower obligatory, and the marriage of Zeenut Oonisa, which took place subsequently, is invalid, in consequence of the previous marriage of the former sister. No defect however arises in the first marriage from the invalidity of the second; and now that the aforesaid Khan is dead, in consequence of his decease, the whole dower of Shureef Oonisa is claimable out of his property.

By that mode of increase termed (*aul*) the property of the aforesaid deceased Khan should be divided into thirteen parts, three of which belong to his widow, four to his mother, and six to his half sister.

The case was brought to a final hearing on the 5th of February 1823, and judgment was passed by the Officiating Judge singly;

the Third Judge, who had joined him in the former stages of the proceeding, having died in the mean time, since the questions had been referred to the law officers. The decree of the Provincial Court of Dacca, dated the 2d of June 1820, was held to require amendment, and it was adjudged, that of the contested eight ana share, one ana belonged to Ameena Khanum, and seven were the property of Kurm Ali deceased. Out of these seven anas, a three and half ana share was awarded to Shureef Oonisa, in liquidation of her claim of dower, by virtue of the deed of gift, and the remaining three and half ana share, it was declared, should be divided among his heirs. In order to adjust this division, the above questions were put to the law officers, and from their answers, it appeared that the property of the deceased Khan, that is, the remaining three and half ana share, should be divided into thirteen portions, three of which belonged to Shureef Oonisa the widow, six to Khizur Oonisa Khanum the half sister, and four to Ameena Khanum the mother of the deceased. Under these circumstances, in consideration of the resolution entered into in conjunction with the late Third Judge, on the 16th of November 1822, the *futwa* of the law officers of the Court, and on the authority of the decree in the case of Gorah Chand Mookerjea versus Ram Lochun Mookerjea, dated the 8th of January 1820, (which case, in consideration of its having been investigated and the decision determined on, before a full Court, was concluded before Mr. J. H. Harrington, the First Judge, alone) a final decree was passed amending the decree of the Provincial Court of Dacca, dated June 2d, 1819, in the manner following: Of the eight ana share in dispute in this case, a one ana share was adjudged to Ameena Khanum, and a three and half ana share to Shureef Oonisa, and the remainder to be divided according to the award of the law officers between Shureef Oonisa wife, and Khizur Oonisa Khanum half sister, and Ameena Khanum mother of the deceased Khan; and it was ordered that the several parties should be put into actual possession of these their several and respective shares. Mesne profits were made payable by the respondents, and costs by the parties respectively (a).

1823.

Mussum-maut Shureef Oonisa, v. Mussum-maut Khizur Oonisa Khanum, and others.

(a) This judgment was subsequently reviewed on the ground of its having been passed by a single Judge, and it was amended on the 25th of August 1824, by the Officiating Chief Judge (J. H. Harrington), the Second Judge (C. Smith), and the Fifth Judge (W. B. Martin). It was held that the deed of gift, in lieu of dower, alleged to have been executed in favour of Shureef Oonisa, had not been sufficiently proved; and after deducting from the estate the sum of 11,000 rupees, to be given to that individual as the sum actually settled upon her by Kurm Ali as her marriage portion; it was ultimately decreed that the remainder of the property should be distributed among her and the other heirs according to the laws of inheritance.

1823.

March 12th.

QUMUR OODEEN, and others, Appellants,

versus

MUDAR BUKSH, and others, Respondents.

Claim to set aside a settlement made by the Collector with the sanction of the Board of Revenue rejected; it appearing that the claimant's ancestor had been in possession as farmer only, and claim not having been advanced until eight years after the conclusion of that settlement.

THIS was a suit instituted in the Furruckabad Zillah Court, on the 9th of September 1816, by Sheikh Busharut Oollah, from whom the respondents inherit, against the appellants, to recover possession, and have his name registered as proprietor of mouzas Bhattipooree and Deorajpoor, and Furuf Kuddumpoor Rusoolabad in pergunna Bhojpoor; suit laid at 1,053 rupees, the amount of the annual assessment.

The plaintiff set forth that the above mouzas constituted a part of the plaintiff's zemindaree, and that he had from time immemorial been in possession of them, and paid the revenue up to the year 1217, F. S., that, in consequence of a drought and the heaviness of assessment, he entrusted them to the charge of his surety, Moohummud Ali Khan, at the beginning of the year 1218, F. S., and went to Cawnpore to seek for subsistence; that during his absence the defendants, through the connivance of the officers of Government, effected the registry of their own names as proprietors of the zemindaree, and obtained possession. The plaintiff proceeded to state, that the plaintiff had brought the present action in consequence of having been referred to a civil suit on attending at the Collector's office in conformity to the order of the Board of Commissioners, for the purpose of having his name entered for the above villages.

The defendants in answer denied the plaintiff's claim, and stated that the villages in question were their hereditary estate, and had for a long time been in the possession of themselves and their ancestors; that for several years the mouzas composing their zemindaree had been united in the settlement with certain villages attached to the estates of other zemindars; that in consequence of disputes between them (the defendants), the plaintiff and the other zemindars above alluded to, about a separation of the villages, Mr. Graham, the Collector, had declared "that the first settlement made by him in the year 1210, F. S., was a temporary one; that a separation of interests in the zemindaree could not then be determined, but that the settlement must be regarded as a *moostajuree* only;" that, accordingly, they considering it undesirable, as theirs was an ancestral estate, to apply for a *moostajuree* tenure, or to have their names registered as farmers, petitioned for it under the name of Sheikh Wulee Moohummud, a stranger, became security for it themselves in the Collector's office, obtained possession, and continued to pay the revenue till the end of the year 1213, F. S.; that in 1214, a settlement was made with the plaintiff for all the above villages during their (the defendants) absence; that in 1216, F. S., the time of the third settlement, when the Collector transmitted to the Board the *sunnuks* of their ancestral zemindaree, as produced by them for the purpose of obtaining possession of the above villages, and the other proofs which they had brought forward to establish their right; the Board of Commissioners being satisfied, on reference to such proofs, of the right of the defendants, annulled the second settlement, which had fraudulently been made with the plaintiff, and ordered the Collector

to receive proposals for a new settlement from the proprietors; that accordingly the Collector, in the year 1217 F. S., made a separate settlement with them for the mouzas in dispute, their rights thereto having been investigated and established; that the above settlement, as well as the fourth, which took place in the year 1220, F. S., was made in their (the defendants) names, and was approved of by the Board, and that had the plaintiff really possessed any just claim to the property, he would not quietly have allowed eight years to elapse without suing.

1823.

Qumur
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others, v.
Mudar
Buksh and
others.

Wulee Oollah, and Ameer Oollah, *alias* Dulloo, presented a petition at this stage of the proceeding, stating that Moojeeb Oollah, their father, and the plaintiff's own brother, were entitled to an equal share of the property left by their grandfather, Iradut Oollah; that the above property had not been divided between their father and the plaintiff, who had forcibly ejected them from a dwelling house which was joint property, and that the plaintiff was entitled to sue for only half of the estate now claimed by him. One Hussun Buksh also presented a petition, stating that he was co-sharer. On the 23d of May 1818, the Acting Judge of the Zillah, in deciding the cause, observed, that it appeared from the documents and evidence adduced in the case, that half of mouza Kuddumpoor, and the whole of mouzas Deorajpoor and Bukht-poree constituted the zemindaree left by the late Iradut Oollah, the ancestor of the plaintiff; that the plaintiff was not entitled, as he represented himself, to succeed as proprietor to the entire estate, for there were other heirs of the deceased; that although it appeared that the plaintiff was seized of the villages in dispute, as well as of certain others, at the time of Iradut Oollah's death, yet it was not clear whether he obtained possession of these villages by means of collusion with the proprietors, or in the exercise of his duties as Chowdhree, and that the plaintiffs statement, with regard to a division of the villages having been made between each of the sons and heirs of the late Iradut Oollah, had not been proved by the papers of the case. He therefore passed a decree awarding to the plaintiff and the other heirs possession of the estate in dispute, and making the costs payable by the defendants.

The defendants appealed to the Bareilly Provincial Court. Sheikh Busharut Oollah was succeeded on his death by Mudar Buksh and Nusrut Oollah, his sons, and Ghous Buksh, Nubee Buksh, and Duleel Oollah his co-sharers. On the 27th of July 1819, the Fourth Judge of the above Court confirmed the decree of the Zillah Court, and dismissed the appeal with costs.

The appellants preferred a petition for a special appeal to the Court of Sudder Dewanny Adawlut which was allowed, on the grounds that the report of the *Canoongoes* of the pergunnah was favourable to the petitioners; that the settlement in the year 1217 F. S., was made in conformity to the order passed by the Board of Commissioners, after having seen the *sunnuds* of the petitioners; that a period of eight years had elapsed from the date of that settlement to the institution of the present suit, during which time the petitioners were in peaceable and undisturbed possession of the villages in dispute, and that the Zillah Judge (who passed a de-

1823. *Qumur Oodeen and others, v. Mudar Buksh and others.* crée in favour of the plaintiff, as heir of the late Iradut Oollah) had stated in his decree, that although it appeared from the papers of the case that the plaintiff was seized of the villages in dispute as well as of certain others, at the time of Iradut Oollah's death, it was not clear whether he had obtained possession of these villages by collusion with the proprietors, or in the exercise of his duties as Chowdhree.

Taj Oodeen, one of the appellants, was succeeded on his death by his son Qumur Oodeen.

The cause came to a hearing before the Fourth Judge (W. Dorin) on the 5th of February 1823, who recorded his judgment to the following effect :

The right of Busharut Oollah, the original plaintiff in this case, and of his successors the present respondents, to the villages in dispute, has not been satisfactory established either by the testimony of witnesses or the documentary evidence produced by them. It is clear, however, that the above villages as well as certain mouzas attached to the estate of other persons, were united with the talook of Busharut Oollah, a Chowdhree of Bhojpoor, who had no kind of proprietary right in the zemindaree, but was merely a *Malgoozar* or farmer. The *pottah* granted in the name of Iradut Oollah, father of Busharut Chowdhree, for fourteen mouzas designated as zemindaree Kuddumpoorah, &c. which has been produced by the plaintiff, is not of itself sufficient to establish his right as proprietor of the villages annexed to his talook. The deeds of sale produced by the plaintiff to prove his right as purchaser are not admissible, no mention having been made of such documents in the original plaint or replication. The plaintiff at that time had probably never thought of such things; but it is very extraordinary that he should have allowed eight years to elapse from the settlement concluded in the year 1217 F. S., without suing. The defendant's witnesses moreover have deposed to the villages in dispute being their ancestral property, and it appears besides, from the proceedings of the Collector, that the report of the *Canoongoes* and principal inhabitants of the pergunnah was in favour of the defendants; and that the Collector, on the authority of that report and of the documents produced by the defendants, made a settlement with them with the sanction of the Board. Accordingly, with the concurrence of the Second Judge (C. Smith), the decrees of the Zillah and Provincial Courts were reversed, and the respondents ordered to restore the lands in dispute to the appellants with mesne profits for the period of their dispossession, and to pay the costs of all three Courts. The appellants names were directed to be registered as proprietors in the Collector's office.

KIRTNARAIN DAS, and others, Appellants,
versus
 RAJKOOMAR RAI, and others, Respondents.

1823.

March 13th.

THIS was a suit instituted in the Dacca Provincial Court (with the permission of the Sudder Dewanny Adawlut because the lands in dispute were situated partly in Zillah Backergunge and partly in Dacca Jelalpore) by the appellants against the respondents, on the 19th of April 1816, to have divided off and obtain possession of a three ana, four gunda share of pergunna Futtehjungness. Suit laid at 384 rupees, three times the annual assessment.

Held that lapse of time does not bar the right to a division of a joint estate, the several proprietors of which had entered into separate engagements for their respective shares, though such shares had never been actually separated.

The plaint set forth that the above share was the ancestral property of the plaintiffs and of the defendants, Rajkishwor and Isworhund, that it was recorded in the name of Kubeek Seekhur Jadoo Indur, and was an undivided estate held by the sharers in coparcenary; that afterwards, at the decennial settlement, no partition of the lands took place, but the name of Kubeek Seekhur Jadoo Indur was erased, the whole annual amount of *jumma* divided into two shares, namely, one of 162 rupees, which was registered in the name of Rughoor Ram Mujmooadar, as belonging to the plaintiffs, and another of 222 rupees, which was recorded in the name of Kishenchunder Mujmooadar as the share of the defendants; that separate engagements were executed for them in the Collector's office at Dacca Jelalpoor; and the revenue of part of the lands collected jointly and of part separately; that the plaintiffs who by the division of the *sudder jumma* were entitled to a six ana, fourteen gunda share, presented a petition in 1218, B. S., to the Collector for a partition of the lands in proportion to the above share of *jumma*, and that an *Ameen* was appointed, who made a measurement of the lands. That, in the meanwhile, the Board of Revenue passed an order on the petition presented by the plaintiff's sharers, declaring that a division of the lands could not be sanctioned unless effected with the consent of both parties, or by the order of a Court of Justice. The *butwarah* was accordingly suspended. The plaintiffs therefore now sued the two defendants and Rajkoomar Rai, who had bought the share from the purchaser at public sale.

Rajkishwor and Isworhund stated in reply, that the above share was never recorded in the Collector's office in the name of Kubeek Seekhur Jadoo Indur, nor were the plaintiffs the heirs of that person; that the above pergunna was distributed among twenty-six persons; that the *jumma* of each of their portions was separate and distinct before the accession of the Company to the Dewanny; and that, at the close of the decennial settlement, each had executed a separate engagement for his respective portion.

Rajkoomar Rai stated in reply, that in the year 1203 B. S., he purchased from Beneepershaud Sookhul, the purchaser at public auction, one quarter of the *jumma* standing in the name of Kishenpershaud Mujmooadar, was in enjoyment of it, did not possess any lands in conjunction with the plaintiffs, and had nothing to say to their claim.

In conformity to the order passed by the Sudder Dewanny Adawlut, on the report of the Judges of the Provincial Court, this

1823.
Kirtnarain
Das and
others, v.
Rajkoomar
Rai and
others.

cause was transferred for decision to the Jelalpoor Zillah Court, as it appeared that the greater part of the disputed lands were situated in that district.

On the 4th of December 1818, the Zillah Judge dismissed the claim with costs, on the ground that the parties had been without dispute in peaceable possession of their respective shares for twenty years, namely, from the beginning of 1198 B. S., the period of the decennial settlement, till 1218, the date of the plaintiff's petition for a *butwarah*, and as the plaintiffs had not sued within the prescribed period to effect an equal division of the estate, the present action was contrary to the regulations, and therefore not cognizable.

On appeal to the Dacca Provincial Court, the Third Judge, in passing judgment, observed that the above *pergunna* was originally recorded in the names of five persons, subsequently, however, at the decennial settlement, it was divided among twenty-six zemindars, and as each proprietor had executed a separate engagement for the *jumma* of his share, he was of opinion that it was a divided and not a joint estate; if it was an undivided one, it was strange that nearly twenty years should have been allowed to pass without a petition being preferred for a partition. He therefore affirmed the Zillah Court's decree, and dismissed the appeal with costs, on the 17th of January 1820.

The appellants preferred a petition for a special appeal to this Court, which was allowed, on the ground of its appearing from the contents of a letter from the acting Collector that the lands themselves were not divided, although the engagements executed for them and the settlements made in the Collector's office were separate and distinct, and because one of the reasons for dismissing the claim, stated in the decree of the Zillah Judge, which was confirmed by the Provincial Court, namely, the lapse of twelve years before the institution of the present suit, appeared to the Court to be contrary to the spirit of the regulation.

The case came to a hearing before the Second Judge (C. Smith), who observed, that the separation and division of the lands belonging to the respective shares of Rajkishwor and others, and Kirtnarain and others, had not been proved; that the respondents, after the issuing of the proclamation notifying that Kirtnarain Das and others had petitioned for a division of the estate, had not, within the period prescribed, shewn cause why such division should not take place as required by section 4, regulation 19, of 1814, and that the lapse of time did not affect a case of the present nature; for these reasons he was of opinion that a division was allowable under the regulations. He further stated, that the public sale in the month of *Jeth* 1203, B. S., of one fourth of the *jumma* belonging to the share of Kishenchunder Mujmoadar, and which was purchased by Beneepershaud Sookhul, did not bar the division claimed by the appellants, inasmuch as that fourth was sold as a parcel of joint and undivided property, as appeared from the evidence adduced.

With the concurrence therefore of the Third Judge (J. Shakespear), who, after an attentive consideration of the papers and circumstances of the case, agreed that no regular division of the

lands in question had ever taken place, the decree of the two lower Courts were reversed, and the claim for the division of the lauds belonging to both shares decreed in conformity to the provisions of regulation 19, 1814.

The costs of all three Courts were made payable by the respondents.

KHAJA NEEKOOS MARCAR, Appellant,

1823.

versus

RAM LOCHUN GHOSE, Respondent.

March 20th.

THIS was a suit instituted by the appellant in the Mymensing A depen-
Zillah Court against the respondent, on the 13th of August 1813, dant talook
to assess at 499 rupees, 8 anas, mouzas Hooseinpoor and Ba- for which
rumpoor, comprised within a moiety of pergunna Ruttumshahee. a *sunnud*
had been

The plaintiff set forth, that Soobharam Ghose, the defendant's granted by
father, obtained a *sunnud* for the village in dispute, as a dependant the former
talook, subject to a trifling assessment, enjoyed possession for some proprietor
time, and paid rent at a rate not permanently fixed; that when the to hold it
above share was publicly sold and purchased by Kalee Pershaud at a fixed
rent, but
Moonshee, Soobharam Ghose would not come to a settlement which was
with him for the rent, but brought an action against him on the granted
plea of his endeavouring to extort excessive assessment, with a within
view to compel the proprietor to confirm the small rent at which twelve
he held the talook; that on his claim being dismissed, he appealed years be-
to the Judge, and the plaintiff having bought the above share fore the
from the purchaser at public sale, succeeded him as respondent decennial
in the cause. The plaintiff proceeded to state, that as the Judge settlement,
referred the plaintiff to a civil suit to fix the *jumma*, and Soobha- held liable
ram Ghose had been succeeded on his death by the defendant to increase
the possession of the villages in question, he had deemed it neces- of assess-
sary to sue that individual with a view of setting the question at ment by
rest. the present
proprietor,
though not
an auction
purchaser.

The defendant allowed judgment to go by default.

On the 19th of June 1819, the Acting Judge, in deciding this case, observed, that it appeared from the decrees passed by the Provincial Court, the Judge, and the Second Register, on the subject of fixing the *jumma*, and which had been filed by the plaintiff's Vakeel, as well as from section 2, regulation 8, of 1793, that the talooks of such talookdars as had not held their lands at a fixed *jumma* for twelve years previous to the decennial settlement, could not be considered *mokurreree* tenures, and from the provisions of regulation 44, of 1793, (which was not rescinded till 1812), that the *jumma* of no talook could be fixed for a term exceeding ten years; that under the *sunnud* granted for the defendant's talook in the year 1192, B. S., it was not held for twelve years before the decennial settlement, nor did it appear from the papers produced from the Collector's office, or otherwise, that the *jumma* of the above talook was fixed and unchangeable.

1823.

He therefore passed a decree ordering the defendant's talook to be measured and assessed, in conformity to section 12, regulation 5, of 1812, and making the costs payable by the defendant.

Khaja Neekoos Marcar, v. Ram Lohunchi. The defendant appealed to the Dacca Provincial Court, and on the 15th of May 1820, the First and Third Judges of that Court passed a decree to the following effect :

As the *sunnud* granted to the appellant's father, declares that more than 121 rupees should not be demanded from the talookdar, who was invested also with the power of transferring the lands by sale or gift, and as the said *sunnud* had been filed in a former suit long before the respondent's purchase, its provisions were valid and binding; and consequently the talook should be considered a *mokurrere* tenure, according to the 49th section of regulation 8, 1793; and not affected by the provisions of section 5, regulation 44, of 1793, which enactment only relates to purchases at public sale. The five years accounts produced by the respondent were not held to be sufficient to prove that the *jumma* of the talook in question was not fixed or liable to increase or diminution. The Provincial Court therefore ordered that the decree of the Acting Judge should be reversed, and that the respondent pay the costs of both Courts.

Khaja Neekoos Marcar presented a petition for a special appeal from the above decision to the Sudder Dewanny Adawlut, which was allowed on the grounds of the orders passed on the 25th of May and 24th of June 1820, in the case of the present appellant Khaja Neekoos, *versus* Nubkisor and others, respondents, and because it had not been proved that the respondent was in possession previously to the year 1192, B. S. The case came to a hearing before the Second Judge (C. Smith) on the 4th of March 1823, who recorded his opinion, that the *mokurrere sunnud* filed by the respondent for the talook of mouzas Hooseinpoor and Barumpoor in pergunna Ruttenshahee, dated the 1st of Sawun 1192, B. S., had not been authenticated; that even if it had, it would have been insufficient, under the existing regulations, to prove the *mokurrere* tenure, because the person who granted it was dead, his zemindaree had passed into other hands, and the *pottah* was only dated six years before the decennial settlement. For these reasons, and on the grounds stated in the decree passed in the cause of Khaja Neekoos Marcar, appellant, *versus* Nubkisor and others, respondents, above adverted to, he considered the judgment of the Acting Judge to be correct and proper, and the reversal of it by the Dacca Provincial Court to be unwarranted by the circumstances of the case.

With the concurrence therefore of the Third Judge (J. Shakespear), the decree of the Provincial Court was reversed, that of the Acting Judge affirmed, and the costs of all three Courts made payable by the respondent, who was ordered to pay to the appellant rent for the talook in dispute from the year 1225, B. S., according to the pergunna rates.

MUSSUMMAUT BHEELOO, (Pauper), Appellant,

1823.

versus

PHOOL CHUND, Respondent.

March 24th.

THIS was a case brought in the Patna Court of Appeal by the appellant, formerly plaintiff (after having established her pauperism), for the sum of 146,075 rupees, in ready money, jewels, and other property, on the 4th of November 1815, against the respondent, formerly defendant. It was set forth in the plaint, that the husband of the plaintiff (Durgahee Naik) and the defendant, his brother, after the decease of their elder brother Nomee Naik and Ruggoo Naik their father, carried on jointly a trade in various commodities; that in 1214, F. S., a dispute arose between the brothers, and they resolved upon coming to a separation; that accordingly an inventory was made of the moveable property, and five arbitrators were named to divide it between them; that when two deeds of partition of the property had been drawn out in the presence of the arbitrators, specifying the share of each to amount to the sum sued for in the claim, and had been signed by the parties and witnesses, her husband and his brother each took their respective shares, and that two days after this, her husband fell ill, and having remained in a state of sickness some days, died on the 22d of *Cheet* 1214, F. S., being at the time separated from his brother; that in the partition the houses were also included, and the plaintiff continued to live in those houses which had fallen to the share of her husband, as also did the defendant in the houses which fell to his share; but that the defendant took advantage of the opportunity offered him by the plaintiff being an unprotected widow, and on the 30th of *Suwan* of the same year, turned her out of her house by force, and seized what property she possessed as her husband's share; that by virtue of the deed of partition the sum claimed is due to the plaintiff as her husband's share of the property; but that as the defendant had refused to give it up to her, she was necessitated to apply to the Court for redress.

Where the widow of a Hindoo is excluded by law from inheriting her husband's property, the Courts are authorized to fix the amount of maintenance receivable by her from her husband's heirs, with reference to the circumstances of the family.

The defendant, in his reply, denied the claim of the plaintiff in general terms; as also that a partition of the property had ever been made, or that he had taken from her the property sued for. He allowed that he had carried on trade jointly with the husband of the plaintiff, but denied that any dispute or division of property had taken place between them while his brother lived. He asserted that the deed of partition filed by the plaintiff was a forgery, and that the plaintiff had received as a gift, in lieu of any demand for future maintenance, from her husband during his illness, in the presence of their relations and neighbours, the sum of 200 rupees in cash, and 150 rupees in jewels, &c. with her own free will and consent.

On the 15th of February 1819, the case came before the Acting Judge of the Patna Court, and the claim was dismissed on the following grounds: That the plaintiff, although time and opportunity had been allowed her, had not filed the deed of partition mentioned in her plaint; that in a former suit instituted by her she had not mentioned that deed, which might therefore fairly be presumed

1823. *Mussum-maut Bheloo, v. Phool Chund.* not to have been in existence; that the claim of the plaintiff was therefore not established, and that she was only entitled to receive a sum sufficient for her maintenance. The defendant was directed to pay her for that purpose, in future, the sum of twenty rupees *per mensem* from the 1st of February 1819; and in consideration of all the circumstances of the case the parties were made to pay their own costs respectively.

The plaintiff appealed in *forma pauperis* from this decision to the Court of Sudder Dewanny Adawlut. On the 28th of September 1820, the case was brought forward before the Senior Judge (Sir E. Colebrooke) and the Fourth Judge (S. T. Goad) of that Court. After reading the papers, it was thought necessary to institute a more minute investigation into the truth, or otherwise, of the statement made by the appellant in the petition setting forth the grounds of appeal, especially as to the validity or otherwise of the deed of partition filed by her. An order was therefore passed that a copy of the petition of the appellant, setting forth the grounds of appeal and the original deed of partition filed on the 31st of July 1820, should be sent, together with the other papers of the cause, to the Judges of the Patna Provincial Court, with a precept to this effect, that they should require of the appellant proof that the said deed of partition was found by her only three days before the decision of the Provincial Court was passed; or that she could not obtain it while the cause was pending; that should the proof afforded be satisfactory, they should summon the witnesses who might be named by the appellant in support of the validity of the deed of partition, as well as those of the respondent in opposition to it, and should take their depositions as usual in the presence of the parties or their pleaders; but that if the proof afforded turned out to be unsatisfactory, they should not require any evidence as to the validity or otherwise of the deed, but should summon the witnesses in support of the appellant's allegation as to the amount of the share of her late husband Durgahie Naik, in order that it might be ascertained whether she was entitled, agreeably to the decision of the Provincial Court, to receive from the respondent the monthly sum of 20 rupees only as maintenance, or whether a larger allowance should be awarded; that they should take the depositions of those witnesses, as well as of any the respondent might wish to bring forward upon the points in question, and send them to this Court, together with a certificate of the execution of the above orders; and any papers relative to the enquiries therein directed to be made.

On a final return being made by the Provincial Court, on the 3d of March 1823, the case was brought to a hearing before the then Chief and Fourth Judges (W. Leicester and W. Dorin). After the case had been gone through, an order was sent to the pundits of the Court to deliver, within one week, an answer to the following questions; If a Hindoo inhabitant of Zillah Tirhoot, who carried on trade jointly and lived together with his brother, died leaving a wife but no children, and if the wife be heir to none of the joint property, moveable or immoveable, is she entitled to receive a sum sufficient for her maintenance; if she is entitled to receive it, whether the amount of it is to be settled by judicial authority or in

what manner, and what ought to be the rule in such cases^{as} 1823.
prescribed by the Hindoo law?

The reply of the pundits was to the following effect: If a Hindoo, inhabitant of Tirhoot, who lived and carried on trade with his brother, die, leaving a wife, but no children, and if his wife does not acquire by inheritance his property, moveable or immoveable, she is entitled to receive a sum sufficient for her maintenance, because the wives of those who die without a division having taken place of the property, which they may have possessed jointly with others, are, by the Hindoo law, entitled to receive a maintenance, and the heirs of the deceased are in the first instance to decide upon the sum they shall give for that purpose; but if it should appear that they neglect to assign a reasonable maintenance, the Judge is at liberty to award a certain sum sufficient for that purpose, with reference to the usage of the family and their circumstances in life, and to cause it to be paid her from the property of the deceased. It appeared to the sitting Judges, that the validity of the deed of partition was not proved from the further evidence, nor the amount of the property established as set forth by the appellant; and that there was no reason for setting aside the judgment of the Provincial Court of the 15th of February 1819. A final decision was therefore passed affirming that judgment, and dismissing the appeal of the appellant, providing, however, that the respondent should pay to her the sum of 20 rupees *per mensem*, as awarded by the Provincial Court for her maintenance. The costs of this Court were made payable by the appellant, as well as the sum paid by the respondent as costs in the Provincial Court, to be levied from any property which the appellant might be proved to possess over and above the sum of 20 rupees *per mensem* assigned her by the Court for her maintenance.

Mussum-
maut Bhe-
loo, v.
Phool
Chund.

BHUWANEE SUHAI, Appellant,

1823.

versus

UCHRUJ LAL, Respondent.

March 25th.

THIS was a suit brought by Uchruj Lal on the 25th of July 1817, in the Zillah Court of Shahabad, for the proprietary right to half the lands comprized in mouza Husra, pergunna Bunwarah, then in possession of the appellant, the triennial revenue of which was stated at 1,086 rupees. It was set forth in the plaint that the defendant and Mulesh Dutt had conditionally sold the whole of the above mouza, which was their property, for 821 rupees to the plaintiff, that the deeds of sale were made out and dated the 3d of Bhadoon 1208, F. S., the condition annexed being that they should repay to the plaintiff the whole of the purchase money with interest, on or before the month of Assin 1214, F. S., to which effect a written obligation was executed; that before the expiration of that period, the money not having been paid, they instituted a suit in the Zillah Court for the redemption of the mortgage against

Judgment
having
been given
against a
mortgagor
who sued
to redeem
the mort-
gaged pro-
perty, on
the plea
that he had
tendered
repayment
of the mo-
ney bor-
rowed, held
that the

1823. the plaintiff and his father Bhinuk Das; that this cause was dismissed by the Judges both of the Zillah and Provincial Courts; which fact was of itself sufficient to establish the right of the plaintiff; that as the revenue of these lands for 1221, F. S., had fallen into arrears to the amount of 200 rupees, (which was purposely managed by the seller) the whole of the mouza was advertised for sale by public auction, when the plaintiff paid up the arrears, with the leave of the Collector, and thus prevented the sale; that afterwards, Muhesh Dutt, on the plea that he was not a party to the execution of the deed of sale, instituted a suit in Court against the plaintiff and his own brother (the defendant) to reverse the sale of his share, and obtained a decision in his favour, an appeal instituted by the plaintiff from which decision is still pending; that as the sellers have unjustly refused to give the plaintiff possession of the above mouza, and continue to receive from the proceeds of it large sums of money, the plaintiff has instituted the present suit, but only for the half share claimed above, as the cause instituted for the share of Muhesh Dutt is still pending in the Court of Appeal.

mortgagee is not there by entitled to foreclosure, without recourse to the rules prescribed by regulation 17, 1806.

The defendant, in his reply, stated that, from the account given by the plaintiff, it appeared a conditional sale had taken place of the share of the defendant, which was not to become absolute until the year 1214 F. S.; that consequently until the mortgagee, agreeably to regulation 17, 1806, obtained a decree from the Court for the perfecting of the sale, and until he had fulfilled the conditions specified in the 8th section of that regulation, the sale could not be considered absolute; that the claim of the plaintiff to be put into possession of the disputed property, without fulfilling the conditions specified in the regulation above cited, was inadmissible, especially as the defendant was, and is still, ready to pay the sum for which it was mortgaged, the tender of which was recognized in the decree of the suit instituted by the defendant, and mentioned above by the plaintiff, in which the defendant was nonsuited on account of two separate claims having been preferred in one suit; that as, on account of the invalidity of the deed of sale the right to the possession of half the mouza had been adjudged to Muhesh Dutt, the claim set up by the plaintiff to the defendant's share of the same upon that very instrument could not be considered good.

On the 16th of March 1818, the cause came to a hearing before the Zillah Judge, and on its appearing that a former cause respecting the right to a moiety of the above mouza, instituted by the defendant, had been decided against him, and had been affirmed by a decree of the Court of Appeal, and that there was no other disputed point in the present case, and the Judge being of opinion that the objections urged by the defendant with reference to regulation 17, 1806, were inapplicable, a decree was passed awarding possession of half the lands of mouza Husra to the plaintiff, and an order was issued to the Collector directing him to register the name of the plaintiff, together with that of Muhesh Dutt, as joint proprietor of that mouza. The costs of suit were made payable by the defendant.

The defendant appealed from the above decision to the Patna

Provincial Court, where, on the 24th of April 1820, it was held, by the First Judge of that Court, that by section 8, regulation 17, 1806, a *bye-bil wuffa*, or mortgage with conditional sale, could not become absolute unless the purchaser presented a petition in Court and a notice was served, allowing a period of one year, to the seller; that therefore the claim of the respondent ought not to have been listened to by the Zillah Court; that, however, as by the decree of the Zillah Court of the 18th of June 1810, in a case pending between the same parties, the claim set up by the appellant for the redemption of the mortgage had been rejected, and permission had not been expressly given to institute another suit, which decree was affirmed by the Court of Appeal, the sale had in the present case become absolute, and the former order of the Court of Appeal could not be set aside. Judgment was, on these grounds, passed, dismissing the appeal and affirming the decision of the Zillah Judge of the 16th of March, 1818; but in consideration of all the circumstances of the case, the costs of suit in the Court of Appeal were made payable by the parties respectively.

The appellant presented a petition to be allowed a special appeal from this decision, which was granted on the 18th of November 1820, and the cause was brought forward on the 24th and 25th of March 1823, before the Chief and Fourth Judges (W. Leycester and W. Dorin). The case having been gone through, it appeared that the appellant admitted having executed the deed of sale of mouza Husra for the sum of 821 rupees in the month of *Bhadoon* 1208, F. S., also that the respondent (the lender, and purchaser of the property) acknowledged having engaged to allow a period closing with the year 1214, F. S., to expire before the sale should be considered absolute. But regulation 17, 1806, respecting such mortgages with conditional sale, was promulgated before the expiration of that period; that is, in the month of *Bhadoon* 1213, F. S. The former decision of the Courts below could not be considered in the light of a final judgment, such as to preclude any further investigation into the rights of the parties, and those decisions only proved that the statement of the borrower respecting his having made a tender of the money, or what remained due of it, was unfounded. Nevertheless, the right of the borrower to the redemption of the mortgage could not lapse until the conditions specified in regulation 17, 1806, had been complied with, and he was at liberty to deposit the money due, with interest, in the Court, and to recover the deed of sale. The lender might also, agreeably to sections 6 and 7 of regulation 17, 1806, allow the borrower a period of one year (by serving upon him a notice to that effect) after the expiration of which, if he should not be paid the money due, the sale would become absolute. On these considerations the decrees of the Zillah and Provincial Courts were rescinded, and the claim of the respondent dismissed. The costs of all three Courts were made payable by the respondent.

1823.

Bluwancee
Subai, v.
Uchruj Lal.

1823.

RANEE KISHENMUNEE, Appellant,

versus

June 24th. RAJAH OODWUNT SINGH, and RAJAH JANKEE RAM SINGH, Respondents.

According to the Hindu law, a widow adopted by a widow with the permission of her late husband, has all the rights of a posthumous son, so that a sale made by her, to his prejudice, of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity.

THIS action was instituted by the respondents on the 18th of February 1818, in the Moorsshedabad Court of Appeal, against the appellant and Ranees Jymunee, to establish their proprietary right to Turruf Kankrakurpoor, &c. situated in zillah Rajeshahye, the triennial assessment of which was stated at 13,432 rupees, and to recover the profits which had been unduly appropriated from the estate by the defendants. The plaint was to the following effect: Ranees Kishenmunee had been left by the will of her late husband, Maharajah Bisheennath Rai Bahadoor, sole possessor and manager of all his property, real and personal. She was his third wife; and, in the same will, her deceased husband invested her with authority to adopt a son by reason of his having died childless. The estate now claimed had been mortgaged in her husband's life time to one Jugmohun, and the period fixed for the foreclosure of the mortgage had nearly arrived under the provisions of regulation 17, 1806, when Kishenmunee, with a view to avert that event, made a conditional sale of the lands to the plaintiffs for the sum of 65,901 rupees. A regular deed of sale was executed, and a written agreement was entered into by the seller, that, in the event of her inability to repay the sum borrowed, with interest, within the period of one year, the sale should become absolute. Of the purchase money 2,570 rupees were paid to Kishenmunee for the purpose of defraying the expences attendant on the worship of the family idols, and the remainder was, with her consent, applied to the liquidation of the mortgagee's debt, and deposited in Court for that purpose. On the expiration of the term of one year, as the time had arrived for making the sale absolute, the plaintiffs made a summary application to the judge of Rajeshahye to enforce the written agreement. Accordingly a written notice was served on Kishenmunee; but although she acknowledged the receipt of the said notice, she had never attended to answer the claim. The plaint concluded by stating that Ranees Jymunee was made a defendant by reason of her having been declared by a decree of Court, passed subsequently to the transaction which gave rise to the present action, proprietor of one moiety of the estate, and that this suit was instituted in compliance with the circular order of the Superior Court, which provided, that it was irregular to decree possession to a mortgagee or conditional purchaser by a summary process. The defendant, Kishenmunee, replied by admitting the loan as stated by the plaintiffs, but she averred in defence that the loan was usurious; that she had, with the permission of her husband, adopted a son named Govind Chunder Rai, whose right to the estate was indefeasible, and who could not legally be deprived of the property by any act of hers which might prove contrary to the rules of Hindoo law; that she had offered repayment of the money borrowed, the receipt of which however the plaintiffs had evaded; and lastly, that the other defendant Jymunee was in league with the

plaintiffs, and conspiring with them to defraud her and her adopted son of their just dues. The defendant, Jymunee, replied by denying the allegation of the other defendant, by asserting that her

1823.
Ranee
Kishenmun-
nee, v. Ra-
jah Ood-
wunt
Singh and
Rajah Jan-
kee Ram
Singh.

late husband had never given permission to Kishenmunnee to adopt a son, that she herself had alone been duly authorized to make an adoption, that the entire estate belonged to her and the son adopted by her; that this fact had been established in a former suit which she had instituted, the result of which was a decree in her favour of one moiety of the estate (her claim for the other moiety being now pending); that the brother of the other defendant had, at a time when their late husband was deprived of his senses, forged a deed of permission to adopt, as if executed by the Rajah, and that Kishenmunnee had no right whatever to dispose of any part of the property, and consequently, that the plaintiffs could only bring their claim against her personally, and not against the estate for any sums which she might have borrowed from them. On the 27th of July 1819, the Senior Judge of the Court of Appeal gave judgment in this case in the following terms: Ranee Kishenmunnee is registered in the Collector's books as proprietor of the estate now in dispute; that she was appointed by her husband's will to be manager of the entire estate has been proved, that she made a conditional sale of the lands to the plaintiffs has also been proved, but the facts alleged by her have by no means been established. As to the objection which she has raised on a point of law, that he was incompetent to make a transfer of the estate, and thereby defeat the right of her adopted son, it cannot avail, because the origin of this transaction was the mortgage which was made in the life time of her husband Rajah Bishennath; and the conditional sale executed by her for the purpose of obtaining funds to redeem the mortgage should, in point of law, be considered as the act of her late husband. As to the right of the other defendant, Jymunee, this question cannot be affected thereby, whatever that may have been ascertained to be, inasmuch as the entire estate of her late husband is answerable for the debt originally contracted by him. Possession of the estate claimed was on these grounds decreed to the plaintiffs with costs.

An appeal was preferred to the Court of Sudder Dewanny Adawlut from the above decision by Ranee Kishenmunnee; and the Second Judge (C. Smith) before whom the case originally came to a hearing, after directing further evidence to be taken with respect to the facts of the case, referred the following question of law for the opinion of the pundits: Supposing Bishennath Rai (the husband of Kishenmunnee) to have authorized her to adopt a son, was she at liberty to make a conditional sale of her late husband's estate? In other words, was such estate the property of her or of the child to adopt whom she had received permission? To this question the pundits replied, that Kishenmunnee having been duly authorized by her late husband to adopt a son, and having been appointed manager of his estate, was not at liberty to make a conditional sale of such estate for any purpose, inasmuch as at the moment permission to adopt was pronounced, it had the same effect as if a child had been conceived in the womb of the widow, and her intention to adopt under the permission, operated, to all intents

1823. and purposes, as if she were *enceinte*; that the boy subsequently adopted by her had all the rights of a posthumous child, and that Kishenmunee had no right whatever to do any act tending to injure his property; especially to make a conditional sale of the estate, which evidently left him in no better condition than if the original mortgage had never been redeemed; that, in fine, the right of property vested in the son subsequently adopted, from the time of the Rajah's death, and that the adopting widow had no authority but that of intermediate management under her late husband's will. ~

Ranee
Kishenmu-
nee, v. Ra-
jah Ood-
want Singh
and Rajah
Jankee
Ram Singh.

AUTHORITIES:—"The children who are born; those yet unborn; and those in the womb, are equally entitled to maintenance; the privation of which is not sanctioned by law." *Smriti*. "Let the Judge declare void a sale without ownership, and a gift or pledge *unauthorized by the owner*." On the 17th of February 1823, the Second Judge having perused the above opinion and the additional evidence which had been called for, recorded his opinion that the decree of the Court below should be amended. It was evident, he was of opinion, that an illegal deduction from the loan had been made by the lenders, as well from the positive evidence of witnesses as from the presumption arising from the universal practice of the bankers of this country. Had this not been the case, a larger sum than was due to the original mortgagee would not have been inserted in the written obligation executed by the borrower; more would not have been borrowed than would be sufficient to redeem the mortgage and pay the price of the stamp paper used in the second transaction. The delivery of more than this has not been proved satisfactorily. Any attempt to extort more than the legal interest, whether by deduction from the loan, or by any means or device whatever, has been prohibited by section 9, regulation 15, 1793. There appeared to him to have been great want of faith on the part of the respondents in this transaction; and he moreover held it to be established by the exposition of the law delivered by the Court pundits, that the landed property of the late Rajah Bishennath Rai belonged of right, not to his widow, but to the son adopted by her in pursuance of the permission granted by her deceased husband. This fact was recognized repeatedly in the correspondence of the Board with the Collector, and must have been known to the respondents, who were acquainted with all that passed in that office. Under all the circumstances of the case, the Second Judge expressed himself of opinion that the respondents were not entitled to recover either the money lent or the landed estate; the first from their having attempted to extort illegal interest, and the second by reason of the estate being the property of the adopted son and not that of the conditional seller. At all events, he thought the present claim should be dismissed, and the respondents referred to a new action to recover the amount of his loan. The papers of the case being made over to the Third Judge (J. Shakespear) for his opinion, he deemed it necessary to put another question to the pundits, to the following effect: Supposing the adoption made by the widow to have taken place subsequently to her conditional sale of her husband's estate, and supposing such conditional sale to

have been the only means of preventing the foreclosure of the original mortgage, would either or both of these circumstances have the effect of realizing the transaction? In reply, the pundits concurred in stating that the date of the adoption could not affect the merits of the case, but they differed as to the other point; Sobha Shastree giving it as his opinion, that the widow would be authorized in making the transfer in case of distress, which rendered it inevitable, and that this was such a case; Ram-tunoo, on the other hand, admitting the legality of the transfer in a case of inevitable distress, but contending that this was not a case of that nature, as the minor would not be answerable for his father's debts until he came of age. The Third Judge, on weighing these conflicting opinions, considered the former to be entitled to the greater weight, chiefly because it coincided with *vyuvusthas* delivered on former and similar occasions, and partly because it was evident that the distress in the present case was of that nature which was contemplated by the law. He was of opinion, that no sufficient proof had been advanced that any deduction had been made from the loan. On the contrary, he conceived the transaction to have been fair and open; that the conditional sale should be held to have become absolute on the expiration of the period specified in the written obligation of the appellant, and he was of opinion, that the decree of the Court below to that effect should be affirmed, as being in every respect just and proper. By reason of this difference between the opinions of the Second and Third Judges, the case was postponed to another sitting for a final decision. On the 24th of June 1823, the Chief and Fourth Judges (W. Leycester and W. Dorin) expressed their concurrence in the view of the case taken by the Third Judge. They held that no sufficient evidence had been adduced to invalidate the conditional sale, which had become absolute on the expiration of the specified period, and that the only point which remained to be determined was, whether or not the transaction should be recognized as valid, according to the tenets of the Hindoo law. On this question they inclined to the doctrine laid down by Sobha Shastree, that the conditional sale by the widow of Bishennath of her husband's landed estate was valid, notwithstanding the fact of his having given her permission to adopt, and of her having subsequently adopted a son in pursuance of such permission; inasmuch as both the law officers agreed in declaring that the transaction would be legal, supposing a sufficient case of necessity to have been made out, and as it must be admitted, that when the period fixed for the foreclosure of the original mortgage drew nigh, there did exist a sufficient case of distress to justify recourse to the measure. The conditional sale was executed to prevent the foreclosure of the mortgage, whereby the interests of the son about to be adopted by the widow would doubtless be best consulted; and although the measure had not the effect of saving the estate ultimately from alienation, yet it put off the evil day, and steps might have been taken in the interval to avert the loss altogether. For these and other reasons, it was finally decreed that the judgment of the Court below should be affirmed. Costs in both Courts were made payable by the appellant.

1823.

Rance
Kishenmu-
nee, v. Ra-
jah Ood-
wunt Singh
and Rajah
Jankee
Ram Singh.

1823. NUNDRAM and others, (Heirs of RAM SUNHYE PANDE,)

Appellants,

June 30th.

versus

KASHEE PANDE and others, Respondents.

According to the Hindoo law, as current in Behar, an only son cannot be given or received in the *Duttaca* form of adoption, and according to the same law, neither joint property nor the profits arising from sacrificial fees are fit subjects of transfer.

ON the 5th of August 1812, Ram Sunhve Pande preferred this suit in the Zillah Court of Behar *in forma pauperis*, against the respondents, to recover possession of one moiety of the *birt* or sacrificial fees of the town of Gya and various other places, estimating the decennial revenue arising therefrom at 2,260 rupees. Also to recover mesne profits unduly appropriated between the years 1209 and 1219, F. S., and six dwelling houses situated in the town of Gya. The plaintiff set forth, that Kasheenath Pande, Sungum Pande and Pullut Pande were joint proprietors of the *birt* in question; that in the year 1185, F. S., Pullut Pande adopted the plaintiff as his son in a formal and legal manner; that the plaintiff's father's name was Bvja Tewaree, and that he had an elder brother named Lal Chund; that in 1195, F. S., the said Pullut Pande made over by deed of gift to him (the plaintiff) his share of the *birt* in question, his proprietary right to the houses situated in the town of Gya, together with all his property real and personal; that the plaintiff, from the date of the gift, to the year 1209, F. S., a period of fourteen years, remained in quiet possession of the property in dispute; but that in the month of *Magh* of the last mentioned year, the defendants wrongfully and forcibly appropriated about 201 rupees of the *birt* produce, in excess of the shares to which they were justly entitled, in consequence of which he complained to the Court, but was nonsuited, the fact of dispossession not being considered to be sufficiently apparent; and he was directed to bring a regular action for the recovery of his rights, which he now did accordingly. The defendant, Juggurnath Pande replied that Mussumant Rutter, the widow of Nursingh Pande, deceased, did in the year 1209, F. S., make over to him and Sungum Pande, by a deed of gift duly drawn out and attested, the whole of the property belonging to her late husband, including the interest of Pullut Singh in the *birt*, which that individual had sold to Manick Chund, the uncle of Nursingh Pande, on whom it had devolved by the course of inheritance; that they had enjoyed the property ever since, maintaining the widow of Nursingh out of the profits, and that the plaintiff had no right or title to any part of it. The other defendant, Kashee Pande, replied that his father Cheytun Pande and Pullut Pande were own brothers; that the latter had no authority to make a gift of any part of the property claimed, it being joint and undivided; that he (the defendant) and his brother were the legal heirs; that the plaintiff being the only son of his father could not legally be adopted; that the *birt muhabrahminee* was not a transferable species of property like lands and houses, nor were the *jymans* or sacrificers fit subjects of transfer, as if they were male or female slaves; that the allegation of the plaintiff, as to his having been in possession for a period of fourteen years was wholly false, and that had this been the case, the sacrificers would never have forsaken the officiating priest whom they had employed in the performance of exequial ceremonies; that the defendant's brother, by name Sungum Pande, had been adopted

by Pullut Pande whose entire property devolved on him, that the deed of gift set up by the plaintiff was a forgery; that at the time it was alleged to have been executed. Pullut Pande was not in his right mind; and lastly, that the plaintiff had no brother by name Lal Chand. A similar defence was made by the third defendant, Sungum Pande.

1823.

Nundaram
and others,
v. Kashee
Pande and
others.

On the 12th of November 1816, this cause was decided in the Zillah Court in favour of the plaintiff, the Judge being of opinion that Pullut Pande and Cheytun Pande were proved to have had equal rights and joint possession; that the former did really adopt the plaintiff and make over to him by gift his entire property, and that there did not exist any legal impediment to the adoption or gift. From this decision Kashee Pande and the heirs of the other defendant since deceased, appealed, and on the 29th of April 1820, it was reversed on the following grounds: It did not appear that the property, part of which formed the subject of the claim, had ever been divided. On the contrary, it appeared from the evidence that it had always been held jointly, and consequently the deed of gift was considered invalid. It was held, that the deed of gift was certainly corroborative of the alleged adoption, but that the adoption itself was illegal, evidence having been adduced to the fact that the plaintiff was the only son of his father. A special appeal having been admitted from the above decree by the Sudder Dewanny Adawlut, it was deemed requisite to put the following interrogatories to the Hindoo Law officers of the Court: Is it allowable, according to the law current in Tirhoot, to adopt an only son? Is it lawful to make a gift of joint undivided property, whether real or personal, according to the same law? Is the *birt mahabrahminee*, or profits arising from the levy of sacrificial fees, a fit subject of transfer; and supposing such profits to be enjoyed jointly by several of the class of persons denominated *Maha Brahmins* (a) is it lawful for any one of the co-partners to transfer his share either by sale or gift? To these interrogatories the Pundits replied, that according to the law as current in Behar, the adoption in the *duttaka* form of an only child was illegal, as the gift and acceptance of an only son were both prohibited, without which formalities a *duttaka* adoption could not be carried into effect; that a gift of joint undivided property, whether real or personal, was not valid, even to the extent of the donor's share, for property cannot be sold or given away until it is defined and ascertained, which cannot be done without a division; that the profits of the *birt mahabrahminee* did not constitute a fit subject of transfer, and that no one of the sharers to the joint profits of the *birt* was at liberty to transfer to another person his own interest therein; that even if the profits had been divided, the same prohibition would apply, inasmuch as the sacrificial fees, which constituted the *birt*, were only fit to be received by the officiating priests, to whom they were offered; and that the purpose of the offerings, namely, the spiritual welfare of deceased ancestors, would be defeated by the alienation.

(a) Priests who attend at funerals, in some districts they are called *Maha Brahmin*; in other *Malupatra*, *Agradan*, *Pretiya*, &c.—See note to page 175, vol. 2, Colebrooke's Translation, *Digest Hindoo Law*.

1823.

Nundaram
and others,
v. Kashee
Pande and
others.

AUTHORITIES:—“Let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors; nor let a woman give or accept a son, unless with the assent of her lord.” *Vasishtha*, cited in the *Duttaka Mimansa* and *Duttaka Chandrika*.

“Partition is the act of ascertaining several individual rights.” *Mitakshura*.

“Having assembled eleven Brahmins, having invoked the manes of deceased ancestors, let him present to the Brahmin occupying the foremost seat, the couch, &c. belonging to the deceased.” *Deva Yagnika*, cited in the *Nirnaya Sindhoo*.

“Having sprinkled them with odoriferous perfumes, let him present to the sacrificer his father's wearing apparel, his ornaments, his sleeping couch, &c.” *Vrihaspati*, cited in the *Nirnaya Sindhoo*.

After a perusal of the above legal opinion, the Chief and Fourth Judges of the Sudder Dewanny Adawlut (W. Leycester and W. Dorin) before whom the case was brought to a hearing, recorded their opinion that there was no sufficient ground for interfering with the decree of the Court below; and on the 30th of June 1823, it was affirmed accordingly. Costs were made payable by the appellants. (b)

1823.

July 5th.

BABOO SHEODAS NARAIN, Appellant,
versus

KUNWUL BAS KOONWUR, and others, Respondents.

In a case of review of judgment, two judges being of opinion that the decree reviewed should be reversed, and two that it should be affirmed, one of the latter having joined in passing the decree reviewed, and the judge who concurred with him in that decision having since died; held

THIS was a review of judgment. The circumstances of the case were briefly as follow: The appellant instituted this action against Kunwul Bas Koonwur, Areemurdun Narain, and Kasheepershad Narain, in the Provincial Court of Patna, on the 21st of February 1817, to recover possession of certain assessed and rent free lands situated in the district of Sarun, the triennial assessment of the former being stated at 18,278 rupees, and the eighteen years produce of the latter at 7,200 rupees. Also to recover the sum of 63,324 rupees in ready money and jewels, wearing apparel, household furniture, &c. of the computed value of 11,183 rupees. The claim was founded on an alleged deed of gift made to the

(b) A review of this judgment was subsequently had, partly from suspicion of the integrity of Sobha Shastree, one of the Pandits who had been consulted in the former decision, and who had since absconded from the Court on being charged with corruption, partly from the production of a conflicting law opinion, and partly on other grounds. But the judgment, as above given, was ultimately affirmed on the 10th of February 1825, by the Officiating Chief Judge (J. H. Harington) and the Fifth Judge (W. B. Martin.) The same interrogatories were put to the law officers then attached to the Court, and their exposition of the law coincided in every respect with that which had formerly been delivered. so as entirely to remove the suspicion of its accuracy. In reply to an additional question, the pundits stated, that if the Officiating Priests termed *Maha Brahmins* take the sacrificial fees in rotation, or day about, in that case the different members of each set of priests should be considered joint and undivided, but that the different sets should be held to be divided.

plaintiff by Bahoo Bhunwur Narain, his paternal uncle, whose property it was, and who died leaving no son. The defendant, Kunwul Bas Koonwur, who was daughter of the aforesaid Bhunwur Narain, replied by denying the alleged gift, and claiming the property for herself, in virtue of her right of inheritance. She pleaded further, that while her sons were alive, her father had no right to make a gift of his property (which was divided from that of his brothers) to any other person. The defendant Aree-murdun died at this stage of the proceedings, and his son Gooropershad Narain appeared to defend the suit on behalf of himself and his minor brother Kaleepershad Narain. He stated in his reply, that his father was the son of Ootum Narain, (brother of Bhunwur Narain) and entitled, therefore, to one moiety of the property of that individual; the other appertaining to Kasheepershad Narain, he being son of another brother, and it being a custom in their family for the estate to devolve upon brothers or brothers sons in default of male issue. Kasheepershad, the other defendant, claimed the whole of the property, on the plea that he had been adopted by the deceased as his *Kurta Pootra*. On the 25th of March 1818, the Second Judge of the Court gave judgment against the claim, on the ground that there was not sufficient proof of the alleged deed of gift; that it had been established that the deceased Bhunwur Narain had been separated from his brothers and lived entirely apart from them; and that, according to the Hindoo law, as current in that part of the country, the title of the daughter and her sons to the succession was preferable to that of the brothers and their sons. The claim of adoption set up by Kasheepershad he considered to be without foundation. From this decision Sheodas Narain appealed to the Court of Sudder Dewanny Adawlut. After additional evidence had been called for on certain points of the case, the Second Judge (Courtney Smith) propounded the following questions to the Hindoo law officers: The deceased Bhunwur Narain had, besides his daughter, Kunwul Bas Koonwur, and his brother's son, Sheodas Narain, two other brothers sons; under these circumstances, was it legal in him to execute the deed of gift, which he is alleged to have done, exclusively in favour of Sheodas Narain? If Bhunwur Narain lived for seven years after the execution of the alleged deed of gift, and retained possession personally of all his property during that period and until the day of his death, is the deed of gift available, to establish the right of property in Sheodas, after the death of the donor, notwithstanding the fact of his never having given up possession? In the event of the invalidity of the deed, and that Sheodas Narain, the donee, has no right of property under it, will the estate devolve on the daughter of the deceased, or on his brothers sons, two of whom are sons of one brother, and the third the son of another brother? and if it devolves on the brothers sons, should each of them get a third, or one half go to the two sons of one brother and the other half to the one son of the other brother? To these interrogatories the pundits replied that, according to the law as current in Benares, the property not being joint, but divided, Bhunwur Narain was competent to make a gift of it, notwithstanding the existence of his daughter, and

1823.

that the opinion of the deceased judge should be taken into account, so as to create a majority, without the necessity of calling in a fifth judge.

1823.

Baboo
Sheodas
Narain, v.
Kunwul
Bas Koon-
wur and
others.

according to the law, as current in Bengal, he would be competent to make the gift under such circumstances, whether the property was divided or undivided; that the fact of the donor's having retained possession could not affect the validity of the gift, it being expressly stated in the deed, that he was holding the property as a loan from the donor, and it being a rule of Hindoo law, that a near relation may be in possession for any period without its operating to transfer the right of property from the proprietor to the possessor; that supposing the deed of gift to be from any cause invalid, in that case, according to the law as current in Benares, if the family was not joint but divided, the property would devolve on the daughter; and if joint and undivided, on the brothers sons; but, according to the law current in Bengal, whether the family were united or separated, the property would devolve on the daughter; and that supposing the right to the succession to vest in the nephews, they would each share alike. On the 29th of May 1821, the Second Judge having attentively weighed all the evidence adduced in the case, recorded his opinion, that the decree of the Court below should be reversed; he being of opinion that the facts of the separation of Bhunwur Narain from his brothers, and of his execution of the deed of gift in favour of his nephew the appellant, were established. He did not, however, deem it advisable to award the personal property, by reason of its nature and amount not being sufficiently defined; and as to the mesne profits, he was of opinion that the appellant should be left to a new suit. The proceedings in the case were next brought before the Third Judge (S. T. Goad) and the Officiating Judge (W. Dorin), the former of whom differed entirely from the judgment recorded by the Second Judge, and expressed his opinion that the alleged deed of gift was entitled to no credit; but the latter concurred with him as to the validity of the deed in question; differing, however, as to the personal property and mesne profits; to both of which he considered the appellant entitled under the deed of gift, after it should have been ascertained from the examination of witnesses, the nature and amount of the personal property left by the deceased. In consequence of this disagreement of the three Judges who had sat on the case, it was laid over for the consideration of the Chief Judge (W. Leycester) who concurring with the Third Judge (S. T. Goad), a decree was passed in their joint names affirming the decision of the Court below, and dismissing the appeal with costs.

The appellant being dissatisfied with this decision also, petitioned the Court to review their judgment, and his petition to this effect was rejected by the Chief Judge (W. Leycester), but an order for review was ultimately granted by the former Fourth, then Third Judge (J. Shakespear) and the former Officiating, then Fourth Judge (W. Dorin). On the 23d of May 1823, the case came to a rehearing, first before the Third Judge (J. Shakespear), who, after causing further evidence to be taken, relative to the alleged deed of gift, recorded his opinion that the document in question was a forgery, and that there existed no reason whatever for superseding the judgment pronounced by the Chief Judge (W. Leycester) and the late Third Judge (S. T. Goad), the latter

of whom had died since the decision. In this opinion the Chief Judge expressed his entire concurrence. The case was next brought before the Second Judge (C. Smith), who, on the 14th of May, recorded his opinion to the following effect: It appears from the proceedings connected with the review of judgment in this case, that the final order for admitting this review was passed by Messieurs Shakespear and Dorin on the 20th of December 1822, when I was prevented by indisposition from attending to my duties in Court, and I was consequently ignorant of the circumstance. On resuming, however, my official duties, I learnt that this review had been admitted, and on the supposition that the case had formerly been decided by the casting voice of the Chief Judge, under the provisions of section 18, regulation 25, 1814, in which case the reason assigned by the late Third Judge (S. T. Goad), which appears to have influenced Messieurs Shakespear and Dorin also would have been insufficient, I protested against the admission of a review on such ground, and my reasons at large are contained in the minute (a) which I

1823.

Baboo
Sheodas
Narain, v.
Kunwul
Bas Koon-
wur and
others.

(a) The following is the minute alluded to :

In this case I find that a review has been granted in a manner which seems to me quite irregular; that is, upon no ground which under the regulation can be deemed sufficient.

The case came first on before me, and on the 9th of May 1821, I gave my opinion, that the decree of the Provincial Court should be amended.

On the 11th of June in the same year, the Third Judge (Mr. Goad) differed from me, and recorded his opinion that the Court of Appeal's decision should be affirmed, and on the same date the Acting Judge (Mr. Dorin) differing both from me and the Third Judge, directed the papers to be submitted to the Senior Judge (Mr. Leycester.)

On the 14th of August 1821, the opinion of the Senior Judge being the same with Mr. Goad's, the appeal was dismissed, and the decision of the Court of Appeal, dated 25th of March 1818, affirmed.

On the 13th of November 1821, the appellant petitioned for a review, under regulation 26, 1814.

On the 19th of June 1822, the Senior Judge rejected the petition, and ordered the case to be brought before the Third Judge, who had been joined with him in the decision.

Upon the 14th of September 1822, Mr. Goad, upon no other ground than that if there had been at the time the case was decided a Fifth Judge in the Court, there would have been five opinions in the case instead of four (meaning clearly that the case would not have been decided by the casting voice of the Senior Judge) and that there was then a Fifth Judge, declares that he has no objection to a review, and to the case being brought before the Fifth Judge for his opinion.

On the 20th of December the papers are brought before the Acting Judge (Mr. Dorin) who, adverting to the arguments in his own proceeding of the 11th of June 1821, declares for a review, and orders the papers (in the absence of the Second Judge from indisposition) to be carried before the Fourth Judge (Mr. Shakespear).

On the 23rd of January last, the Fourth Judge admits the review, and is now actually investigating the case.

It being perfectly obvious that Mr. Goad saw no necessity for a revision upon any of the grounds specified in section 4, regulation 26, 1814, it must be concluded that, as far as any regular grounds are concerned, his voice was against such revision.

It must further be allowed to have been utterly incompetent to Mr. Goad to take the circumstance of the case having been decided by the Senior Judge's casting voice as a sufficient ground for a revision, when that casting voice is given to the Senior Judge by express regulation (section 18, regulation 25, 1814) and given undoubtedly to meet this very emergency of the members of the Court being equally divided.

1823.

Baboo
Sheodas
Narain, v.
Kunwul
Bas Koon-
wur and
others.

wrote upon the occasion. But it now appears from the explanation furnished by the Chief Judge, that the former decision was not obtained by his casting voice, but on a majority of voices. Under these circumstances, I also am of opinion that the judgment in question should be reviewed; because, although Mr Dorin and myself differed as to minor points, with respect to the personal property and mesne profits, yet we concurred in the main point, in adjudging possession of the real estate to the appellant under the deed of gift; and it was not in such case competent to any two other Judges to disturb that judgment without calling in a Fifth Judge. As the review has been admitted, it is competent to any Judge who may have had a share in the former investigation, to record his opinion on the retrial, let that opinion agree with or differ from the judgment which he had formerly recorded. On a review of the whole of the proceedings in this case, I am of opinion that nothing new has been elicited to invalidate the deed of gift under which the appellant claims. On the contrary, the evidence since adduced has the effect, in my mind, of attaching greater credit to it. But with respect to the personal property, and the mesne profits of the estate, on which point my former judgment differed from that of Mr. Dorin, I am inclined to retract my own opinion, and to coincide with his; because the same deed of gift that purports to convey the real property, disposes of the personals also; and if it be valid for one description of property, it must be so for both; nor if the suggestion of Mr. Dorin be carried into effect, will there be any uncertainty in the award, as so much only will be awarded as may be proved to exist by satisfactory evidence. The same principle applies to the mesne profits. If the amount of these be now ascertained by evidence, it will have the same effect as if a new suit were instituted; and it will besides save the parties from much unnecessary trouble and expence. Under these circumstances, if the Fourth Judge (Mr. Dorin) should still concur with me in opinion, it will be necessary to consult a Fifth Judge to adjust the differences; the voices of the

Not even the Senior Judge himself could divest himself of that privilege, nor has he in this case expressed any disposition so to do.

Mr. Shakespear's opinion, if his proceedings are not stopped, as I propose they should be, may agree with the First and the late Third Judges as to the merits of the case, and then the state of things, bating the anomalous nature of the whole proceeding, and the danger of the precedent, will be as if no revision had been granted.

But should Mr. Shakespear proceed with the case, and decide in favour of the opinions recorded by the Second Judge and the late Officiating Judge, it is manifest that the Senior Judge will have been deprived of his casting voice in the teeth of a positive regulation.

Conceiving Mr. Goad's resolutions of the 14th of September for referring the papers to a fifth Judge to be supported by no regulation, and to be in direct violation of the one above cited, I think it necessary to record my opinion, that the resolutions of the 14th of September and 20th of December 1822, and the Fourth (now Third Judge's) order of the 23rd of January last, should be rescinded and the petition for a review be finally and fully rejected."

But the Chief Judge explained that he had not given any casting voice in the case, and that the late Mr. Goad and himself having agreed, and the other two Judges not having agreed with each other, the case was decided by a majority of voices. The other Members of the Court also recorded their opinions on this occasion, that it would be consistent with equity to review the judgment.

Chief and Third Judges being against those of the Second and Fourth Judges of the Court, as at present constituted, and there being consequently no majority on either side; as the judgment of the late Third Judge, since deceased, cannot be reckoned on the present occasion. My present judgment is, that the decree of the Patna Court of Appeal, dated the 25th of March 1818, should be reversed; and that the appellant Sheodas Narain, in virtue of the deed of gift in his favour to that effect, should be put into possession of all the lands assessed and rent free, situate in the pergunnas of Sircar, Sarun and Champarun, which may have been the property of the late Bhunwur Narain; and with respect to the personal property and mesne profits, that he should be put in possession of them also, after their amount shall have been established by evidence, supposing such property and profits not to exceed the amount specified in the claim. On the 4th of June, the Fourth Judge (W. Dorin) recorded his opinion that, as the present Third Judge had concurred in the judgment pronounced by the Chief and Third Judges, such concurrence should be held to be conclusive: and that there was no necessity for his again entering into the merits of the case; as the judgment of himself and of the Second Judge had been overruled, and the case disposed of by a majority. The proceedings in the case were ultimately referred to the Chief Judge for a final order, and he concurring in the opinion last expressed, and seeing no reason to depart from his former judgment, it was affirmed accordingly; the appeal finally dismissed, and all costs in both Courts made payable by the appellant.

1823.
Baboo
Sheodas
Narain, v.
Kunwul
Bas Koon-
wur and
others.

MURDUN SINGH, and others, Appellants,
versus

1823.

RUGHONATH PATHUK, (manager on the part of VISHNOO-
PERSHAUD SINGH, a minor son of BAHADOOR SINGH, and
GOOROO DUTT SINGH, heir of BISHEN SINGH, deceased),
Respondent.

July 19th.

ON the 6th of September 1813, the appellants sued Bahadoor Singh and Bishen Singh, both since deceased, in the Zillah Court of Cawnpore, for possession of one moiety of mouza Anora, pergunnah Korah, in that district, the extent of which was stated to be 2,811 beegas, and its annual produce estimated at 1,600 rupees. The plaint set forth, that the moiety sued for was the hereditary property of the plaintiffs, and had regularly descended to them from their ancestors; that they had been both since and previously to the accession of the Company, in the possession and enjoyment of all its rents and profits; that their original title deeds had been destroyed by fire, and that in the year 1210, F. S., when a pottah for the zemindaree was given to Murdun Singh, (one of the plaintiffs) by the Tehseeldar, in which pottah he was designated a Moocuddim, he remonstrated against this appellation: but being assured by the Tehseeldar that the title of Moocuddim was superior to that of Zemindar, he continued without further remonstrance to hold under this title up to the

A settle-
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held that,
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clause 9,
section 53,
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cial decree.

1823. year 1212; that at the settlement made at the end of the year 1213, he was registered in the books as zemindar, but that in the settlement made in the year 1215, Bustee Ram Mutusuddee the writer of the book of settlements, conspiring with the defendants, fraudulently entered their names as proprietors, and that of the plaintiff Murdun Singh as Moocuddim; that on the plaintiffs petitioning the Collector against this act, that officer enquired into the business, and finding that the proprietary right really belonged to the plaintiffs, passed an order that at the next settlement, which was to take place in the year 1220, F. S., the settlement should be made with Murdun Singh, and his name entered in the books as proprietor; but that when the period for making that settlement arrived, the defendants contrived, by collusion with the officers of the Collector's establishment, to continue the registry in the books of their own names as proprietors. The defendants in reply alleged that the property in dispute had been the exclusive property of themselves and their ancestors for a period of more than two hundred years; that the plaintiffs had no right or title whatever, and that had they possessed any, the plaintiff Murdun Singh never would have consented to the registry of his name as Moocuddim.

Murdun
Singh and
others, v.
Rugboonath
Pathuk.

On the 12th of February 1818, the Acting Judge of the Zillah gave judgment in favour of the plaintiffs, on the following grounds: The long possession of the plaintiffs and their ancestors was clearly proved by the evidence of credible witnesses, while, on the other hand, the witnesses adduced on behalf of the defendants were wholly unworthy of belief. Not one of them was a native of that part of the country in which the disputed lands were situated. Some of them admitted that they had never visited the place, but once; and others that they had never gone near it at all; and their evidence went to prove that the estate in dispute was taken under Government management from the year 1185, F. S., and that the possession of the defendants was only that of a Chowdhry or Talookdar. It appeared also from the book of settlements for the year 1213, F. S., that the name of Murdun Singh, one of the plaintiffs, was then registered as proprietor; but in the year 1216, his name was erased from the list of proprietors, and inserted under the head of Moocuddumee tenants; but, it did not therefore follow that previously to the last mentioned period, they had ever been considered in that light; and even admitting that the plaintiffs were in possession of the disputed lands merely as Moocuddims, still that fact could not form any argument of the defendant's proprietary right. It was, besides, evident that he who holds property as a Moocuddim should be kept in possession until some superior title were established. It was moreover notorious that at the period of the first, second, and third settlements, from the ignorance and inexperience of the landholders, numbers of them were registered as Moocuddims. It therefore appeared unjust that the mere fact of one of the plaintiffs having been registered as such should be considered sufficient, without proof of some superior title, to oust them from the possession of their property. Although the Persian statement of tenses certainly did show that for the year 1210, F. S., the name of Adhar Singh, the father of the

defendants, was mentioned as proprietor, and although in the book of settlements for the year 1216, the names of the defendants were registered as proprietors, yet it is, by no means apparent under what circumstances these entries were made. There was no petition from the defendants forthcoming setting forth their claims, nor was there any proceeding of the Collector recognizing their rights, nor was there any document to prove that the slightest investigation or enquiry was instituted into their claims previously to the registry of their names as proprietors. According to the provisions contained in clause 8, section 53, regulation 27, 1803, the Collector was not competent to eject the plaintiffs in favour of the defendants, without a decree in favour of the latter by a Court of judicature, in which tribunal alone the cognizance of the claims of the parties was vested. On the whole, it was clear that the entry of the defendants names as proprietors was fraudulent and collusive, and there did not appear any ground on which their rights could be maintained. Under this view of the case the Acting Zillah Judge decreed the lands in dispute to the plaintiffs, and the costs were made payable by the defendants.

1823.

Murdun
Singh and
others, v.
Rughoonath
Pathuk.

The defendants being dissatisfied with the above decision preferred an appeal from it to the Bareilly Provincial Court, and on the 26th of August 1818, the Second Judge of that Court, in concurrence with the Fourth Judge, reversed the decree of the Acting Zillah Judge, on the ground that Murdun Singh having been recognized as Mooquddim only, could not now claim the rights of zemindar, and that the names of Adheen Singh and Bahadoor Singh having been registered as proprietors ever since the Company's rule, those individuals ought to be recognized as possessing the proprietary right until some superior title should be established. A special appeal was admitted by the Court of Sudder Dewanny Adawlut on petition to that effect by the appellants. In the mean time Bahadoor Singh, one of the original defendants, died, and Rughoonath Pathuk appeared to defend the suit on behalf of his minor son Vishnoopershaud Singh. Bishen Singh had also demised, and Gooroodutt Singh, though he proved his right of inheritance to that individual, failed to attend. On the 28th of July 1823, the Second Judge (C. Smith) recorded his opinion that the rights of the appellants had been satisfactorily established in the Zillah Court, and that the respondents had not exhibited any title to the property. It was evident, he thought, that the respondents had collusively effected the entry of their names in the Collector's books; indeed the decree of the Provincial Court did not show the existence of any title on the part of the respondents; but possession was decreed to them on the ground of the registry of their names, and of the appellants appearing to have been called Mooquddims. This decision appeared repugnant to the principle repeatedly recognized in the decrees of the Court of Sudder Dewanny Adawlut, and the appellants in virtue of their Mooquddimee right (supposing that they were merely Mooquddims) were clearly entitled to retain possession of the lands in the absence of the lawful proprietor. On the 19th of July the case was brought before the Fifth Judge (W. B. Martin) who expressed his concurrence in the opinion of his colleague. He observed

1823.

Murdun
Singh and
others, v.
Rughoo-
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that at the first settlement of the lands in dispute under the Company's government, the name of Murdun Singh was entered on the Collector's books as Moocuddim, and that this Murdun Singh had for many years held possession under the former Government; that at the second settlement the Collector after due investigation, by enquiring of the *Canoongoes* and persons conversant with the affairs of the pergunna, had caused the name of Murdun Singh to be erased from the list of Moocuddims and entered under the head of proprietors, and with him the settlement was then made in proprietary right, he continuing in possession as the ostensible proprietor from the beginning of 1213 up to 1216 F.S.; that under these circumstances his name must have been subsequently struck out either through inadvertence or fraud and collusion; for the Collector and his officers had no authority whatever, without a judicial award to that effect, to make any alteration in the proprietary right once registered. Under these circumstances a final decree was passed reversing the decision of the Provincial Court, and affirming that of the Acting Zillah Judge. The costs in all three Courts were made payable by the respondents. (a)

1823.

THE COLLECTOR OF BAREILLY, (on the part of
Government), Appellant,

July 22nd.

versus

MAJOR HEARSEY, Respondent.

Held that according to the spirit of the rule contained in section 5, regulation 18, 1814, a second notice was requisite on a sale being postponed, whether the postponement arose from unavoidable cause or otherwise, and that the provisions of section 9, regulation 11, 1822, modifying the rule above quot-

THE case was in substance as follows :

On the 1st of December 1820, the respondent sued the Officiating Collector of Bareilly, and Toorab Khan, the purchaser of the talook of Bulhearee, pergunna Pillibheet in that zillah, with a view to set aside the auction sale of the talook in question. The suit was brought originally in the Bareilly Provincial Court, and laid at 9,730 rupees, the amount of arrears of Government revenue alleged in the proclamation of sale to be due from the proprietor. The plaint set forth, that on the 18th of August 1817, the plaintiff had purchased at public auction, the talook in question, which contained one hundred and seventeen mouzas, for the sum of three thousand rupees; and on the 18th of October of that year had obtained a regular bill of sale from Government for the same; that he had at a great expence brought into cultivation the lands comprised in the estate; that of nineteen of the mouzas he never could obtain possession, but that he nevertheless had regularly paid up the rents due from the estate; that agreeably to the eleventh section of regulation 26, 1803, it was the duty of the

(a) The provision on which this case principally turned has been reenacted by section 13, regulation 7, 1822, which prescribes that Collectors, and other officers exercising the powers of Collectors, shall not, unless where specially authorized, do any act tending to disturb possession, but shall leave the Adawlut to investigate in a regular suit all claims of persons not in possession, but deeming themselves entitled to be so.

Collector to put the plaintiff into possession of all the lands comprized in his purchase; that the plaintiff petitioned to be put in possession accordingly, and that due investigation being made, it was clearly proved to the satisfaction both of the Collector of Bareilly and the Commissioner of Kumaon, that the nineteen mouzas claimed by him actually did form a part of his purchase; notwithstanding which fact and the plaintiff's continual remonstrance, he never could obtain possession; that on this account the Government revenue fell into arrears, and the former Collector having left the station, the officer who was acting in his place advertised the lands of the plaintiff for sale by public auction, stating the arrears at 16,430 rupees; that on that occasion the plaintiff paid up all the arrears which he considered to be due, notwithstanding which a second proclamation of sale was issued on the 19th of August 1820, for the alleged arrear of 9,730 rupees; an amount which was never due, even computing the rents on the lands of which the plaintiff had not obtained possession, and which up to the day of sale would only amount to 5,804 rupees; that the day fixed for the sale was the 18th of September 1820, and that the Acting Collector would not listen to any remonstrances on the part of the plaintiff, who offered security to pay off the arrears in two years by instalments out of his personal allowances, and who, on this tender being rejected, subsequently gave in to the Collector a note of hand of Kewul Ram and Sheonath for seven thousand one hundred and seventy rupees, and an order for his own salary for the month of August, amounting to five hundred and sixty rupees; that the Acting Collector accepted this tender, desiring him at the same time to get the note of hand discounted and to bring the money, promising that the sale should be postponed to the 22d of September; that the plaintiff relying on this assurance, was in the act of devising the means to raise the money, when he suddenly heard that the Collector on the 19th of September had given orders that the sale should take place on the following day, the 20th; that he immediately sent his agent to the Collector's *cutcherry*, and tendered two thousand rupees in cash, and a promissory note of Mullik Ahmed Khan for the sum of five thousand rupees payable in fifteen days; that he subsequently tendered a bill drawn by Captain Roberts, but all to no purpose, the whole talook having been sold on the 20th of September, without any proclamation having been affixed either in the Court of the Judge or the Collector's *cutcherry*, for the sum of ₹1,700 rupees, when there were only two or three persons present; and although by the sale of five, or at the most ten of the mouzas included in the talook, the arrears due might have been realized. The defendant, Toorab Khan, declined entering into any reply, stating that he was the auction purchaser, but that it did not rest with him to defend the legality of the sale. The Collector of Bareilly replied, that it was the duty of the plaintiff, if he considered that he had a right to those lands, of which he stated that he could not obtain possession, though included in his purchase, to have sued the actual possessor of them, and to have established his right in a court of justice; that he (the plaintiff) had admitted some arrear to be due, though he disputed the amount, and such being the

1823.

ed, are not applicable in trying the merits of an appeal from a decision passed previously to the promulgation of the latter enactment.

1833. **The Collector of Bareilly, v. Major Hearsey.** case, he should have contested the justice of the demand, depositing the money in Court previously to the sale, by which means he might have procured an order to stay it; that the plaintiff's objections to the sale were perfectly frivolous, inasmuch as the revenue authorities were vested with the power to sell either the whole or a part of the lands on which arrears had accrued as they might think proper; and as, agreeably to section 5, regulation 18, 1814, the sale not taking place on the 18th of September, a second proclamation was duly issued to the effect that it would be held on the 20th; that the plaintiff had been allowed the period of one month to enable him to procure the cash to the amount of arrears due, but that this indulgence having been granted to him, and he having tendered the sum of 2,000 rupees only in ready money, it would have been obviously improper to accept payment in bills or promissory notes. On the 26th of May 1821, the Senior Judge of the Bareilly Court decreed in favour of the plaintiff, on the grounds that he had, by the evidence adduced, fully established the fact of his never having obtained possession of the nineteen mouzas claimed by him, which belonged to the talook he had purchased, which were included in the bill of sale, which formed no less than a sixth part of the entire estate, and of which, as he had not obtained possession, the revenue due to Government should have been deducted from his rent roll; that the 18th and 19th of September were Moosulmaun holidays, and that there was no advertisement to the effect that the sale should take place on the 20th, nor notice sent from the Collector's *cutcherry* to that of the Judge, which facts were alone sufficient to invalidate the sale, and that the defendant had tendered unexceptionable securities, fully adequate to the arrears demanded. Under these circumstances, he adjudged that the sale of Talook Bulhearee, which had taken place on the 20th of September 1820, should be rescinded; that the defendant, Toorab Khan, who had purchased the said talook, should receive back the amount of his purchase money from the Collector's office, and relinquish in favour of the plaintiff all claim to the lands, accounting to him at the same time for the mesne profits during the period of his possession; that the Collector should make a deduction in favour of the plaintiff to the amount of 6,250 rupees, on account of the revenue for three years of the nineteen mouzas of which he had never obtained possession, and another deduction to the amount of 865 rupees on account of excess of rent levied from mouza Jusid above the proper assessment; that the plaintiff should obtain possession of his lands on paying up the sum of 614 rupees due as arrears; and that, until he was put in possession of the nineteen mouzas which he claimed, and which formed part of his purchase, the Collector should allow him, on the part of Government, a yearly deduction of one-sixth of the revenue at which the talook of Bulhearee was assessed at the time of sale. The costs were made payable by the Collector.

An appeal was preferred to the Court of Sudder Dewanny Adawlut by the Collector from the above decision. The case was brought forward out of turn, on a petition to that effect from the appellant, and on the 1st of May 1823, the Second Judge (C. Smith) delivered his opinion to the following effect: It appears

that the respondent (Major Hearsey) did, on the 18th day of August 1817, corresponding with the 21st of *Sawun* 1214, F. S., purchase for the sum of 3,000 rupees, the talook of Bulhearee, which was assessed at an annual *jumma* of 12,501 rupees. He continued to discharge the revenue due on the estate regularly until the year 1216 F. S., and although it is true he all along objected that he had not obtained possession of nineteen of the one hundred and seventeen mouzas comprized in his purchase, yet no validity was ever attached to this objection by the Board of Commissioners; on the contrary, on the receipt of a report from the Commissioner of Kumaon, dated the 19th of July 1820, the Board of Commissioners, on the 4th of August of the same year, declared the objection to be unfounded, and issued a positive order that the talook should be sold, unless the whole of the arrears for the year 1217 F. S., and the preceding years, were paid up. It is also apparent from the evidence adduced, that the nineteen mouzas, possession of which was claimed by Major Hearsey were not possessed by the former proprietor, to whose interest alone he succeeded by purchase, an auction purchaser having a right to take only so much as may have been in the possession of the former proprietor. His objection, that he did not get possession of nineteen of the mouzas, and his claim to be consequently relieved from a portion of the assessment, are wholly inadmissible. He should have sued the actual possessor to recover the lands to which he considered himself entitled. It appears, moreover, that the purchaser Toorab Khan, who purchased the same talook, never obtained possession of the nineteen mouzas claimed by Major Hearsey, and yet that he has punctually discharged the annual assessment of 12,501 rupees. It is also proved, that when the talook of Bulhearee was brought to sale it was in arrears to the amount of several thousand rupees. The objections therefore of Major Hearsey as to his not having obtained possession of a few mouzas, and as to the over assessment of another, are wholly inapplicable. In the first notice of sale, dated the 15th of August, the day fixed for the auction, was the 18th of September, corresponding with the 9th of *Zeelhi*, which is the Moosulmaun holiday termed the *Urfa*, or day preceding the *Eed-oozoka*. But this holiday does not prevent the transaction of public business, and it could only have been out of tenderness to Major Hearsey that the sale was postponed. The fifth section of regulation 18, 1814, prescribes that the Collector is to publish a notice of the day on which the postponed sale is to take place only when some unavoidable cause renders necessary the postponement of a sale duly advertized, in which case it would be requisite that a second notice should be affixed, as well in the Court of the Judge as in the Collector's *cutcherry*. But where a sale is put off merely out of indulgence to a defaulter, which cannot be held to come under the definition of an *unavoidable* cause, no such process is requisite. As to the objection urged against the quantity of land sold, although the sale of a smaller portion would have sufficed to make good the arrear, it is wholly untenable, inasmuch as it is discretionary with the revenue authorities to dispose, either of the whole or of a part of a de-

1823.
The Collec-
tor of Ba-
reilly, v.
Major
Hearsey.

1823. **faulter's estate.** In point of fact, as the entire talook of Bulhearee sold for only 3,000 rupees on the former occasion, it was natural to suppose it would fetch no more a second time. The other agreements in support of the claim are wholly unworthy of attention. If Major Hearsey really desired to procure a postponement of the sale, he should have sued the Collector, filing adequate security in Court agreeably to the regulations; nor was the Collector competent to receive a less sum than that which was stated in the notice to be due as arrears to Government. The Senior Judge of the Court of Appeal has not only directed a rescission of the sale in this case, but he has ordered a deduction of one-sixth to be made from the annual assessment. This order has not only nothing to do with the claim, but it is positively illegal, and beyond his competency; the power of making any abatement in the public revenue being expressly reserved to the Governor General in Council. On these grounds the Second Judge held that the sale by auction of the property of Major Hearsey was perfectly legal and regular, and that the decree of the Court below (including all its provisions) should be reversed. The case next came to a hearing before the Chief and Fourth Judges (Messrs. Leycester and Dorin) who called for additional evidence on various points, but chiefly as to the practice usually observed in the Collector's office in causing a proclamation of sale to be affixed in the Court of the Judge; whether it was done through the medium of the *Vakeel* of Government, or by means of a common *Chuprassee*. On the 22nd of July 1823, the further evidence having been received, the Judges abovenamed recorded their judgment in the following terms: In this case there are two points to be considered; first, was the decision of the Court below, under date the 26th of May 1821, which set aside the sale, correct with reference to the rules which existed at that time; secondly, supposing the sale to have been illegal, was the Court below at liberty to make any deduction from the Government revenue. On the first point, it is evident that the sale which took place on the 20th of September 1820, was in pursuance of the former advertisement in which the 18th was mentioned as the day of sale, and that the postponement was made on the 19th. But agreeably to the fifth section of regulation 18, 1814, it was incumbent on the Collector, having postponed a sale, to issue a second advertisement specifying another date, and to affix it as well in the Court of the Judge as in his own *cutcherry*. Independently of the fact, that the 19th was a holiday on which the Court was shut and empty, there exists no trace at all of any advertisement having been fixed there on that day. On the contrary, it is highly probable, from the circumstances of the case, that no second notice was issued at all. But as the Collector was not competent, after having once postponed the sale, to proceed to sell the estate without carrying into effect the provisions of the regulations in such cases, it is clear that his act, as far as Major Hearsey is concerned, must be considered harsh and severe, and should be rescinded as being in it-self illegal. This opinion, however, has reference to the rules in force relative to sales at the time the decree of the Provincial Court was pronounced, the provisions of regulation 11, 1822, not being applicable

The Collector of Barreilly, v. Major Hearsey.

to the case. On the second point, namely, the deduction ordered by the Court below from the assessment of the estate as originally fixed, the objection of the appellant is forcible and just; the judicial authorities having no authority to make such deduction on the plea of the purchaser that he had not obtained possession of all the lands included within his purchase, or on any other plea or pretext whatever. The purchaser in such case had only two alternatives, either to resign his purchase or to content himself with it, adopting any measures he might deem advisable to recover the portion of which he had not obtained possession. On the above grounds, the decree of the Court below was amended; that part of it which declared the public sale of talook Bulheeree null and void being affirmed, and that part of it being annulled which ordered a deduction in the assessment. Major Hearsey was ordered to pay up all the arrears of revenue claimed as due to Government at the time of the sale, and the Collector directed to refund to the purchaser the principal of his purchase money. The costs were made payable by the parties respectively. (a)

1823.

The Collector of Bareilly, v. Major Hearsey.

(a) In the absence of the Chief and Fourth Judges (W. Leycester and W. Dorin) who passed the above decree, a petition was presented for a review of judgment which was granted by the Second Judge (C. Smith) and the Officiating Judge (J. Ahmuty), and on the 28th of July 1824, it was reversed by the two last named Judges, in concurrence with the Fifth Judge (W. B. Martin), on the ground that evidence had been subsequently produced which proved that notice of the postponement of the sale was actually issued. This was gathered first from the depositions of Heera Lal, then a Mohurrir in the Collector's Cutcherry, who stated, that on the day of the festival termed the *Eed-oozoh*, the Acting Collector caused Motee Lal, a moonshee, to write out the advertisement, which being done, and the paper signed and sealed, the Collector gave it to the Nazir to take to the Court of the Judge. And, secondly, from the deposition of Gunga Sing, a Chuprassee, who stated that he himself on the day of the *Eed-oozoh*, had affixed the notice of the postponed sale on a pillar in the verandah of the Judge's Court. The reversal of the first decree of the Court on review was grounded on a matter of fact rather than of law, and the principle appears to have remained untouched. The ultimate decision was to the following effect, namely, that the decree of the Provincial Court of Bareilly, dated the 26th of May 1821, should be reversed, and that judgment should be given in favour of the appellant; that the sale of the Talook Bulheeree, which took place on the 20th of September 1820, should be held good; that Toorab Khan should be put in possession of his property as before; that if, in conformity to the orders of the Provincial Court, the purchase money had been restored to him, he should pay it back into the Treasury; that if, according to the same decree, the produce of the year 1228 F. S. had been given to the respondent, he should return it to Toorab Khan with interest; that the respondent, should restore to the purchaser all the profits obtained from the estate from the date of his having been put in possession of the disputed property, and that after deducting the revenue due to Government, any surplus remaining of the purchase money should be given to the respondent, who was ordered to pay the costs of both Courts.

1823.

NAROOPA NAIK, and another, Appellants,

versus

July 24th.

MR. DAVID CLARK, (Representative of DR. TURNBULL,
deceased), Respondent.

Held that the seller of a bill of exchange is answerable for the amount in the first instance, when not paid by the drawee; that his having lodged the amount of it in the hands of another banker on account of the purchaser, without the purchaser's sanction, does not exonerate him, and that his not having received back the bill or caused it to be cancelled, affords sufficient presumption, in the absence of proof to the contrary, that such sanction was not obtained.

DOCTOR TURNBULL was the original plaintiff in this case. On the 22nd of March 1817, he sued the appellants, Moraree Jee, their *Gomashta*, Ram Bukhsh, and Ram Kunhye, proprietors of the banking-house known by the name of Soobhee's house, and their *Gomashtas* Ram Sunhye and Ram Das, in the Zillah Court of Mirzapore, to recover the sum of 4,958 rupees on account of two bills of exchange, with interest and incidental expences. He stated that Moraree Jee, the *Gomashta* of the house of Naroopa Naik and Co. bankers of the town of Mirzapore, had, through the medium of Gunga Bishen a broker, sold to him (the plaintiff) two bills of exchange drawn by Anund Rai and Luchmun Das of Oomraotee, on the house of Soobhee and Ram Sunhye, in favour of Soobuns Rai and Sahjee, duly endorsed with the names of the latter individuals, the one bill being for two thousand rupees, dated in *Magh Soodee* 1872, *Sumbut*, and the other for two thousand three hundred rupees, bearing the same date; that the plaintiff forwarded these two bills to his agents Lalljee and Soonkh Lal at Koonch, who sold them to Nukjoo Ram and Suramun Das, which two persons sold them to Ramper-shaud and Bajee Rai, who sold them to Luchmee Narain and Sheodas, by whom they were sold to Mohun Lal, who sold them to Muddun Gopal and Gungapershayd, who sold them to Suntokh Ram and Kashee Ram; that when these last mentioned individuals presented the bills for payment at the house of Soobhee and Ram Sunhye of Benares, they would not cash them, although accepted by their *Gomashta* Ram Das, on the plea that they had not received the amount from the house of the drawers; that in consequence the bills were returned on the plaintiff's hands, through the several intermediate endorsors and pavees, and that as he had been obliged to pay the amount with interest, and all expences to Nukjoo Ram and Suramun Das, he was entitled to recover from the defendants, who were the sellers and acceptors of those bills. The defendants, Ram Sunhye, Ram Bukhsh and Ram Das, replied that they had nothing to do with the bills of exchange; that the defendant Ram Das had not accepted them from the hands of the plaintiff's *Gomashtas*, and that they were prepared to answer any claim that might be preferred against them by Suntokh Ram and Kashee Ram, who had presented the bills for payment at the house of Benares, and had procured them to be accepted; that the plaintiff's action would lie only against those to whom he had paid the money, and not against them (the defendants). Naroopa Jee, Dadojeepidree, and Moraree Jee, the other three defendants, replied that they could not be obliged to pay twice the amount of the same bills; that agreeably to the plaintiff's order they had deposited the amount of both bills in the house of Goala Das, and that the rules established among bankers did not admit of their being sued on this account; particularly as those bills had been presented for payment to the house of Soobhee and Ram Sunhye

in favour of Suntokh Ram and Kashee Ram, not in favour of the plaintiff, and were accepted by Ram Das the gomashta of the house; and that as the plaintiff's claim for the principal could not lie against them, still less could his action for interest and incidental expenses be maintained.

On the 22d of July 1817, the Officiating Judge of the Zillah Court, after due consideration of all the pleadings and evidence adduced in the case, recorded his decision to the following effect: As Moraree Jee, and the other two defendants associated with him, do not deny having sold the bills of exchange to the plaintiff, and having received from him the amount for which they were drawn, and as that amount was never realized from the house of Soobhee and Ram Sunhye or their gomashta, Ram Das, it becomes clearly a debt due from the three first mentioned defendants, which they are bound to discharge. Their plea that they had by order of the plaintiff lodged the money in the house of Goala Das is not worthy of attention, as had they done so, they would most assuredly have got back the bills and cancelled them. But the bills of exchange, so far from having been cancelled, are now in the possession of and have been produced by the plaintiff. The fact of their having been written on plain paper cannot invalidate them, as they were drawn out at Omraotee, a place not within the territories of the Honorable Company, and where no stamps are used. On the above grounds, therefore, he decreed that the gomashta Moraree Jee, and his principals Naroopa Naik and Dadoojee Pidree should, jointly and severally, pay the amount claimed by the plaintiff, together with all costs of suit, except those incurred by the other defendants, who were ordered to pay their own costs. These three defendants being dissatisfied with the above decision, appealed from it to the Benares Provincial Court. After taking the answer of Jumna Das, heir of Goala Das, and the deposition of Luchmun Das and four other witnesses, as to the allegation of the defendants, that the money had been lodged on account of the plaintiff in the house of Goala Das, a difference of opinion arose between the Second, First, and Third Judges, on the merits of the case; but the decree of the Zillah Judge was ultimately, on the 31st of January 1820, affirmed, the Fourth Judge concurring in opinion with the Senior Judge to that effect. The appellants were ordered to pay costs and interest up to the date on which the debt might be liquidated, and they were at the same time declared at liberty to draw from the house of Jumna Das the money which he admitted they had lodged in the hands of his father. A special appeal was admitted from the above decision by the Court of Sudder Dewanny Adawlut, and Dr. Turnbull having died in the interim, Mr. David Clark appeared by *vakeel* as his representative. The reason of the admission of the appeal by the Chief and Fourth Judges (W. Leycester and S. T. Goad) as set forth in the proceeding of the latter, was as follows: It appeared that the petitioners had, in point of fact, as stated by them, lodged the money due to Dr. Turnbull in the hands of the banker Goala Das, and that the Fourth Judge of the Court below had, assigned as a reason for giving judgment against the petitioners, that they had made the deposit without sanction, which, if they had obtained, they would

1823.
Naroopa
Naik and
another, v.
Mr. David
Clark.

1823. have got back the bill of exchange, but in the opinion of the Fourth Judge of the Sudder Dewanny Adawlut, the fact of the bill not having been returned was not conclusive proof that such sanction had not been obtained.

Naroopa Naik and another, r. Mr. David Clark.

On the 24th of July 1823, the cause came to a hearing before the Third Judge (J. Shakespear). As the appellants were unable to adduce any proof whatever that they had lodged the money in the hands of Goala Das with the sanction of Mr. Turnbull, and as upon this point, in the opinion of the Third Judge, the merits of the appeal rested, he passed a final decree that the judgments of both the Courts below should be affirmed, and the appeal dismissed with costs.

1823.

HIDAYUT ALI and QADIR ALI, Appellants,

versus

July 29th.

PREM SING, Respondent.

The conditional sellers of certain lands reinstated in possession, on payment of purchase money, though the deed containing the condition could not be produced and the absolute bill of sale only was forthcoming; and though two of the sellers admitted that the condition had been cancelled; it appearing that the provisions of regulation 17, 1806, had not been conformed to.

ON the 19th of March 1818, the appellants and Kurum Hoosein instituted an action against the respondent in the Zillah Court of Cawnpore, to recover possession of mouza Moohummudpoor in pergunnah Bhookeepoor. The suit was laid at 1,750 rupees. On an adjustment of accounts (it was stated in the plaint) between the defendant and the plaintiffs, and one Looft Hoosein, who was a copartner in the above landed property, it appeared that there was due from the latter to the former seven hundred and some odd rupees, principal, and a little more than five hundred rupees as interest, reckoned prospectively for two years to come. With a view to the liquidation of this sum, the defendant on the 24th of *Asarh* 1220 F. S., caused the plaintiffs and Looft Hoosein to execute a bill of sale of the above mouza in his favour, for the sum of 1,300 rupees, himself executing an obligation that he would restore the instrument in the event of his receiving the purchase money back within the period of two years. The defendant had won over Looft Hoosein to his interest. The plaintiffs had within the stipulated period repeatedly tendered to him the purchase money, but he constantly refused to receive it, saying that he would take back the principal at the expiration of the period agreed upon, and that in the interval he was content with the interest. The plaintiffs remained in possession of the mouza until the end of the month of *Asarh* 1222, F. S., and during this period had sent to the defendant the sum of two hundred and seventy-five rupees out of the profits of it, notwithstanding which, he, of his own authority, took possession of the mouza, without making any application to the judicial authorities, as required by section 8, regulation 17, 1806. The plaintiffs accordingly petitioned the Court that they might be allowed to deposit the purchase money, and that a notice might be served on the defendant agreeably to the provisions contained in the enactment above cited, but they were referred to a regular suit. The plaintiffs concluded by stating, that if Looft Hoosein was determined to sell his share, they were entitled, as

partners in the estate, to the right of preemption; and that, on the case being decreed in their favour, they were willing to pay him a sum proportionate to his interest in the estate. On a subsequent date, one of the plaintiffs, Kurum Hoosein, and Lootf Hoosein presented a petition, styling themselves proprietors of one moiety of the estate, and setting forth that they and the plaintiffs had joined in conveying the mouza by sale to the defendant, and that as they had cancelled the obligation executed by him to restore the bill of sale within a specified period, the sale was complete, and, as far as their moiety was concerned, that they had no claim whatever on the defendant. The defendant made the following reply: The obligation executed by me, which alone can have the effect of changing the nature of the transaction from an absolute to a conditional sale, is not in the possession of the plaintiffs. They state that they have lost it; whereas, in point of fact, they returned it to me two months before the expiration of the period therein specified, by reason of the deterioration which the property had undergone. Under these circumstances the condition was cancelled and the sale perfected. Consequently recourse to the rules prescribed in regulation 17, 1806, quoted by the plaintiffs, was wholly unnecessary. How was it possible that their allegation of having paid two hundred and seventy-five rupees could be true, when they borrowed from Narain Sing, the defendant's father, the sum of two hundred and twenty-five rupees to pay the Government revenue for the year 1222 F. S. On the 27th of May 1819, the Zillah Judge passed a decree in favour of the plaintiffs, on the grounds that the rules contained in regulation 17, 1806, had not been complied with by the defendant; until after compliance with which he could not obtain absolute proprietary right in the estate. The plaintiffs were ordered to pay down the purchase money, they being at liberty to sue the defendant for mesne profits, and the defendant being declared liable for all costs.

An appeal having been preferred to the Bareilly Provincial Court, the above decision was, on the 4th of April 1820, reversed by the Chief and Officiating Judges, on the ground that the bill of sale executed by the respondents was absolute and unconditional, and that they could produce no evidence to invalidate the transfer.

Hidayut Ali and Qadir Ali presented a petition to the Court of Sudder Dewanny Adawlut for the admission of a special appeal from the above decision. This was granted for the reasons contained in the proceedings of the Second and (former) Fourth Judges (C. Smith and S. T. Goad), dated the fifth and twenty-sixth of August 1820, namely, that the decision of the Court below appeared, *prima facie*, to be contrary to the provisions contained in the 17th regulation of 1806, and the rules laid down in the circular order of the Sudder Dewanny Adawlut dated the 22nd of July 1813, and that if the original acknowledgment of Prem Sing had been returned to him, he would have been able to produce it instead of a copy. On the 2nd of July 1823, the cause came first to a hearing before the Second Judge, who recorded the following opinion: There is no written evidence to prove the cancelling of the obligation executed by Prem Sing on the 7th of July 1813, a copy of which instrument was filed in the Zillah Court of Cawnpore, but

1823.

Hidayut
Ali and
Qadir Ali,
v. Prem
Sing.

1823.

Hidayat
Ali and
Qadir Ali,
v. Prem
Sing.

the original of which has never been produced. Without the production of the original no reliance can be placed on the testimony of the witnesses to the copy. It appears that a petition was presented to the Register for a copy of the instrument, in the month of March 1815, that is, before the expiration of two years from the date of its execution. It is evident that the provisions contained in regulation 17, 1806, were not conformed to, and consequently that the sale could not have become absolute. There was no specification of the shares of Meer Kurum Hoosein and Meer Looft Hoosein, which strengthens the suspicion of their being in league with the adverse party. The decree of the Zillah Court provides that the appellants, shall, after paying the sum of 1,310 rupees, be put into possession of mouza Moohummudpoor, pergunnah Bhookeepoor, but in reversing the decree of the Provincial Court, and confirming that of the Zillah Court, it is necessary to advert to Meer Kurum Hoosein and Meer Looft Hoosein. On these grounds the Second Judge recorded his opinion, that the appellants should be reinstated in their property on repaying the sum ordered to be deposited by them by the Judge of the Zillah Court; that they should be at liberty to sue the respondent for mesne profits; that Meer Kurum Hoosein and Looft Hoosein, after the amount of their interests in the property shall have been established, should be at liberty to enter as copartners, on paying to the appellants a sum proportionate to their respective interests, to reimburse the appellants for having advanced their share of the contribution to the respondent, and that the respondent should be held liable for all costs of suit in the three Courts. On the 29th of July 1823, the Chief and Fourth Judges (W. Laycester and W. Dorin) expressed their opinion on the merits of this case in the following terms. On reviewing the whole of the circumstances of the transaction on which this suit is founded, it appears clearly to have been the intention of the parties to make only a conditional sale, in other words, to negotiate a loan on the security of the property in dispute. It never was intended that the sale should become perfect and absolute. This appears evidently from the nature of the bill of sale and its concomitant obligation, conditioning for the term of two years. It also appears that the rules laid down in regulation 17, 1806, without which a conditional sale cannot become absolute, have not been conformed to by the purchaser. He has moreover furnished no proof whatever that his obligation was cancelled. With respect to it there is merely his simple uncorroborated assertion, that after it was returned to him it was accidentally burnt. The appellants, on the other hand, assert that it was lost while in their possession. If two of the partners of the estate, which was conditionally sold, choose to divest themselves of their rights by collusion with the adverse party or otherwise, the fact cannot operate to cause the alienation of the estate from the hands of the other sharers, nor could this result follow even admitting that all the sharers had united in divesting themselves of their rights, and had, on the application of the conditional purchaser, restored to him the obligation he had executed; as this could have been brought about only by circumvention and fraud. In fine, the transaction cannot by any means be considered

to be out of the predicament of a conditional sale. On the above grounds the Chief and Fourth Judges expressed their concurrence in the opinion recorded by the Second Judge, and a final decree was passed accordingly.

GUNGADHUR PEHAREE, and others, Appellants,

1823.

versus

HURCHUNDER GHOSE, and others, Respondents.

July 29th.

THIS suit was instituted by Kaleeshunker Ghose, since deceased, in the Calcutta Provincial Court on the 9th of February 1816, against the appellants and others, to recover possession of Govindpoor and two other mouzas, as well as certain lands with a salt-work attached thereto, in talook Kishenpoora, pergunnah Abkorah. Suit laid at 6,000 rupees, the *Sudder Jumma* for the *Umlee* year 1220.

The plaint set forth, that the above talook, which was the zemindaree of the late Koonjbeharee Chowdree, was sold on the 10th of May 1811, in satisfaction of arrears of revenue due to Government, and purchased by Rajchunder Shome and Bhyro Singh Chowdree; that Brijkishwur Raotura and Gungadhur Rai (Koonjbeharee's sons and two of the defendants in the present action) refused to relinquish possession of the lands in question, although they had been assessed by the Commissioner of Cuttack at 6,000 rupees; on the grounds that they formed a *lakhiraj dewan* tenure; that at the request of the Collector an *aumeen* was appointed by the Judge to put the purchasers in possession, but they, before they had recovered possession of the entire estate, sold it in *Asarh* 1219, *Umlee*, to the plaintiff, and, in consequence of a petition presented by him, the Collector requested the Judge to put him in possession. An *aumeen* was accordingly deputed for this purpose on the 21st of October 1821, with instructions to put the plaintiff in possession of all except the *lakhiraj* lands; but on the defendants petitioning to be continued in possession, the matter was referred to the Calcutta Provincial Court, and although they directed the plaintiff to be put in possession, considering that the right of the purchasers at public sale had devolved on him, and that the opposition manifested by the defendants was wrongful, yet their order was not carried into execution by the Judge; that the plaintiff in consequence of the Court's delaying to pass an order, and of a demand made by the Collector for the revenue of the entire talook, petitioned the Commissioner of Cuttack, who after the plaintiff's agent had executed an engagement to pay two years rent, issued an order that no further demand should be made from him either for the sum of 6,000 rupees due as arrears for the year 1220, *Umlee*, or revenue at the same rate *per annum* for the years 1221 and 1222, until such time as he should have recovered possession of all the lands from which he was then ejected; but that the plaintiff must enter into security to the above amount to liquidate the debt as soon as he

An engagement having been taken from a landholder in Cuttack, to pay so much rent for his talook, in the event of all the lands therein comprised being declared by the result of the suit which he had instituted to be liable to assessment, held by the Commissioner that on decree to that effect, the revenue of such lands should not belong to Government, though exceeding ten beegas. Decree affirmed by the *Sudder Dewanny Adawlut*.

1823. obtained possession ; that the Collector accordingly withdrew his demand for arrears on the plaintiff's execution of the above mentioned engagement, and that subsequently the Judge, in conformity to a further order from the Calcutta Provincial Court, put the plaintiff in possession of the estate in dispute ; that he was however obliged to relinquish it in consequence of an order passed on the petition of Gungadhur Peharee by the Sudder Dewanny Adawlut, dated October the 8th, 1814, reversing the order of the Provincial Court, and directing that the defendants should be reinstated, and should receive from the plaintiff mesne profits, with interest at the rate of one *per cent per mensem* for the period of their dispossession; leaving, however, to the Collector or the plaintiff the power of suing, if they had any claim to make, and could prove that the above lands were not rent free; that as the plaintiff had entered into security to pay the sum of 6,000 rupees, arrears for the year 1220, and the two following years, and as by an order passed by the Board of Revenue dated December the 22nd, 1815, the demand for only two out of the six thousand rupees had been withdrawn, and he had already paid the other sum of 4,000 rupees; as his title to the lands in dispute could be substantiated by documentary evidence, as well as the testimony of witnesses, and as the defendants refused to restore possession, he was now reduced to the necessity of suing for the recovery of his rights.

Gungadhur
Peharee
and others
v. Hur-
chander
Ghose and
others.

The defendants Gunghadhur Peharee, Gokul Bundhoo Adhikaree, Basoo Misr, and Gunj Das, in answer, denied the claim preferred by the plaintiffs, and stated that Govindpoor and seventeen other mouzas, as well as the lands specified in the claim, had, from time immemorial, been appropriated to religious purposes by their ancestors, from whom they inherited, and had the management of the property; that when the villages and lands belonging to Abkorah and other pergunnahs were attached by Deo Geer Gosain, the Mahrattah Aumil, they obtained an order for their restoration from Maharajah Rughoojee Bhoonsla, in conformity to which, the Aumil (Luchmun Geer Gosain) son of Deo Geer, executed a formal release from demands of rent; that, after the accession of the Company, the above lands were inserted in the books as *lakhiraj* tenures, and *deoshewah sunnuds*, entered and registered in the Collector's office in the year 1212, according to his orders; that Casheenath Mullick, dewan of the Collector's office, purchased pergunna Abkorah in the year 1218, at public auction, in the fictitious names of Rajchunder Shome and Bhyro Singh Chowdree, and with a view to set aside their (defendants) title, fraudulently petitioned the Collector to be put in possession of the above lands, which he represented as liable to assessment; that at the Collector's request, the Judge appointed an *Aumeen* to give him possession of all the lands, except such as were rentfree; that the purchasers having failed in obtaining possession of the rentfree lands, sold the above talook to the plaintiff towards the end of 1219, when another *Aumeen* was by similar means nominated to put him in possession; that the *Aumeen* after having examined the various papers and documents connected with the property, reported that it was a *lakhiraj* tenure, set apart for religious pur-

poses, and accordingly the defendants were continued in possession by the Judge, who referred the matter for the orders of the Calcutta Provincial Court; that the orders of the above Court awarded to the plaintiff possession of the lands in dispute, but that these were subsequently reversed by the order of the Sudder Dewanny Adawlut, under which they recovered possession and mesne profits with interest, which was sufficient of itself to invalidate the plaintiff's claim. 1823. Gungadhur Peharee and others, v. Hurchunder Ghose and others.

Brijkishwur Raotura and Gungadhur Rai stated in reply, that they had nothing to say to the present claim, which only affected Gungadhur Peharee and the other persons in possession of the lands in dispute. Anund Chund Ghose and Hurchunder Ghose, the sons, and Mussummaut Gourmonee Dasee, the widow of the late plaintiff, alleged in replication, that the villages and lands in dispute had always paid revenue during the time of Deo Geer, Luchmun Geer, and Sudasheo Geer, the Mahratta Aumils; and that the defendants assertion that they had obtained a deed of exemption for the property in question from Luchmun Geer, could be disproved by reference to the papers and documents executed in the time of the Aumils, which made no mention of the circumstance; that the defendants allegations with regard to the *sunnuds* for the above lands were clearly false, inasmuch as, on the first accession of the Company, the Collector never compelled any one to take a *sunnud*, but each person had the option of entering any kind of *sunnuds* he pleased; and lastly, they denied that Casheenath Mullick had, as the defendants stated, bought the above pergunna in a fictitious name.

The defendants in rejoinder alleged, that if Sudasheo Geer, the Aumil, had received revenue for the lands in dispute, as being a *malgoozaree* tenure, the papers on that subject must undoubtedly have been given to the Commissioner; that it would appear from the deposition of the Omlah in the Collector's office, that Casheenath Mullick had filed forged papers in that office, and that they had enjoyed possession in the same manner as the other proprietors of rentfree lands in Zillah Cuttack, by taking *sunnuds* in which the *lakhiraj* lands were specified.

The cause was transferred under regulation 5, of 1818, from the Calcutta Provincial Court to the Commissioner of Calcutta, who on the 24th of June 1820, passed a decree awarding to the plaintiff possession of the lands in dispute, with the exception of four *bates*, three *kans*, of *dewutter* land in mouza Goolabparah, &c. which appeared by a *sunnud* dated the 14th of *Shaban* 1195, and executed by Koonjbeharee Chowdree, to have been appropriated to the use of the idol *Kunnuk Doorga Thakoorain*; and making the defendants pay costs, on the grounds that all the other *sunnuds* produced by them were either evidently forged, or inadmissible under the provisions of clause 2, section 18, regulation 12, of 1805; and that the lands claimed had been subjected to assessment along with the other parts of the talook during the time of the Aumils Deo Geer Gosain and Sudasheo Geer, and up to the date of the auction sale. The Commissioner recorded in his decree, that although, according to the provisions contained in the first clause of section 22, regulation 12, 1805, the revenue assess-

1823. abts on all lands which shall be adjudged or become liable to the payment of revenue under sections 18, 19, and 20, of that regulation, is declared to belong to Government, yet, as it had been established that the lands now claimed had formerly been subject to the payment of revenue, together with the other parts of the assessed talook of Kishenpoora, the provisions of the rule quoted did not apply to the case. Besides, the plaintiff had executed an engagement to the late Commissioner, at the time of the former quinquennial settlement of talook Kishenpoora, that he would pay rent at the rate of 20,158 rupees *per annum*, in the event of his getting possession of the whole of the lands comprized therein; and agreeably to the orders of the Board of Revenue the sum of 2,000 rupees was annually deducted from his assessment, which deduction was to continue to be made until the suit should be decided; the lands in dispute being, in the mean time, attached by Government, and the proceeds of them, amounting to more than 5,000 rupees, having been deposited in the treasury. In the event therefore of its being declared that the revenue of the lands in question should belong to Government, it would be necessary to make a corresponding abatement in the rents demandable, from which the state might suffer a pecuniary loss.

Gangadhar
Peharee
and others,
v. Hur-
chunder
Ghose and
others.

The defendants appealed from the above decree to the Court of Sudder Dewanny Adawlut, and the cause came to a hearing before the Second Judge (C. Smith) on the 29th of April 1823, who deemed it necessary to call for further evidence, and a precept was issued to the Commissioner of Cuttack calling upon him to submit all the summary and Foujdaree proceedings which might have been held relative to the estate in question. It appeared also desirable to ascertain what connexion existed between Kaleeshunker Ghose, the ancestor of the respondents, and Casheenath Mullick, and whether or not the latter at the time of the public sale of talook Kishenpoora, actually stood appointed to the office of Dewan to the Collector. The summary proceedings which were held on giving possession of the estate to the auction purchasers were called for, as well as the criminal proceedings instituted by the *vakeel* of Government in a case of forgery connected therewith. The Commissioner was directed to report, not only whether at the time of sale Casheenath was Dewan, but if so, how long after the sale (which apparently took place in May 1811) he continued in that situation, and on what date he was removed; also whether Kaleeshunker Ghose, a resident of Calcutta, who on the 9th of April 1812, purchased one half of the talook from Rajchunder Shome, and on the 4th of June of the same year, the other half of the talook from Bhyroo Singh Chowdree, was in reality the father-in-law of Golucknath Mullick the brother of Casheenath, as alleged by the appellants, and, supposing him not to have been Casheenath's brother's father-in-law, whether he had any other connexion with that individual. On the 31st of June 1823, the required information having been received, the Second Judge recorded his opinion to the following effect: No satisfactory evidence has been urged to invalidate the title deeds adduced by the appellants. No dependance can be placed on the records of the Collector's office, for it appears that Casheenath was Dewan of that office

from the month of February 1811, to the year 1815, and that the sale of Kishenpoora took place in May 1811. The probability is, that the said Casheenath purchased it for himself in the name of a relation or dependant. The Commissioner has admitted the validity of one of the *sunnuds*, and yet has refused to pass a decree in favour of the appellants on the strength of it. The reason assigned by the Commissioner for rejecting the *sunnuds* dated the 30th of *Assin* of the *Umlee* year 1199, namely, its not having been confirmed by the Government for the time being, as required by the 18th section of regulation 12, 1805, appears to be wholly groundless; it having been established, by the evidence of witnesses, that the Rajah of Nagpore, then the ruling authority, did, in point of fact, issue orders for exempting the lands from assessment. Those *sunnuds* which the Commissioner has declared invalid, under the provisions of the 23d section of regulation 12, 1805, do not appear to have been justly set aside. That section prescribes that, if a *sunnud* shall not have been registered within the period of one year from the commencement of the *Willayutee* year 1213, the lands therein specified shall be held liable to assessment. The Commissioner himself admits that those *sunnuds* were registered in pursuance of the Collector's proclamation on the 30th of December 1806. But the *Willayutee* year 1213, ended in the middle of September 1806. The fact of the registry having taken place three or four months after the expiration of the year, owing to the removal of the Collector's cutcherry or other accident, cannot be held sufficient to invalidate the *sunnuds*. Such a construction would neither be consistent with equity nor agreeable to the spirit of the regulation quoted. As therefore it does not appear that sufficient reasons exist for declaring the *sunnuds* void, and as the appellants have held long and uninterrupted possession of the lands specified therein, free of assessment, it appears just that they should not now be resumed. Under these circumstances the Second Judge recorded his opinion that the decree of the Commissioner of Cuttack, dated the 24th of June 1820, should be reversed; that the appellants should recover possession of the property in dispute with mesne profits, and that the respondents should pay all costs of suit.

The case, however, having next been taken up by the Chief and Fourth Judges (Messrs. Leycester and Dorin) they briefly expressed their opinion, on the 29th of July 1823, that there existed no sufficient ground for interfering with the Commissioner's decree, which was accordingly affirmed, and the appeal dismissed with costs.

1823.

Gungadhur
Peharee
and others,
v. Hur-
chunder
Ghose and
others.

1823.

OOMAID, Appellant,

versus

Aug. 7th.

KHYRAT ALI, (son of SYUD ALI), Respondent.

Sale by the real proprietor of certain lands upheld as valid and binding, though his name had never been recorded in the Collector's books as proprietor, and though the property continued to be registered in the name of one of the seller's relations for some time after the sale.

ON the 23d of April 1814, the appellant sued Syud Ali, the father of the respondent, in the Zillah Court of Cawnpore. The object of the suit was to procure the erasure of the name of that individual from the records of the Collector's office, in which he was styled a joint proprietor, and entitled to fifteen out of twenty *biswas* of mouza Futtihabad Khujoor, pergunna Dubra Mungulpore, the annual assessment of which was stated at 936 rupees. The plaint set forth that the mouza in question formed part of the zemindaree of Chowdhree Sahib Dad Khan, who, in the year 1210 F. S., procured a settlement of it to be made in the name of Syud Ali the defendant, his sister's son, and in the year 1213, in that of his minor son Moommud Buksh, and retained by this means possession of the management of it until the end of the last mentioned year; that he, subsequently to that period, on the 17th of September 1806, made an absolute sale of the entire mouza to the plaintiff for the sum of 311 rupees, giving him a duly attested bill of sale for the same; that the plaintiff in consequence procured his name to be registered as sole proprietor of the mouza in question, and was recognized as such in the settlements which were made in the *Fuslee* years 1216 and 1219, but that in the year 1220, the Collector had, on the application of the defendant, recorded him as joint proprietor, though he did not possess a shadow of legal claim. The defence was that the property claimed never belonged to Sahib Dad Khan, but had exclusively belonged to the defendant, in proof of which he urged the settlement that had been made in his name. On the 1st of September 1818, the Officiating Zillah Judge being of opinion from the evidence, oral and documentary, which had been adduced, that the property in dispute did formerly *bonâ fide* belong to Sahib Dad Khan, and that that individual had made a positive and unreserved sale of it to the plaintiff, passed judgment in his favour, and ordered that the name of the plaintiff should be registered as proprietor to the exclusion of that of the defendant, and that he should be maintained in sole possession.

On the 18th of January 1819, an appeal from the above decision was preferred to the Provincial Court of Bareilly. It was urged among the pleas of appeal that the right of Sahib Dad Khan, from whom the respondent claimed to derive his title, had not been proved to have ever existed; that Sahib Dad did not appear to have been ever registered as proprietor of the lands in dispute, or recognized as such since the Company's accession or before that period. In reply it was urged, that Sahib Dad Khan had been all along the original proprietor, although he had in the year 1210 procured the name of the appellant to be registered as the *ismi furzee* or ostensible proprietor; that in the year 1213, he procured the name of his own son, Moommud Buksh, to be entered as zemindar, and that if the appellant had possessed any legal title he would at that time have sued Sahib Dad and his son; and he would also have objected when the transfer was made to the

respondent; that the settlement had been made by the Collector with the respondent alone from the year 1216 to 1219; but that in the year 1220, owing to the collusion of Sahib Dad Khan with the appellant, the name of the latter was entered in the records as joint proprietor. On the 12th of April 1820, the Senior Judge of the Court of appeal, after having caused further evidence to be taken in the Court below in support of the appellant's title, recorded his opinion that the Zillah decree should be reversed on the following grounds: The respondent had never caused the bill of sale alleged to have been executed in his favour to be registered, nor had he, until after a period of three years from the date of its execution, caused a transfer of names to be made in the Collector's books, as admitted by himself. Sahib Dad Khan, one of the respondent's witnesses, denies on oath the assertion of his having voluntarily sold the lands in dispute or received the purchase money, and he, as well as the other witnesses adduced by the appellant, state that the property belongs to him. When in the year 1210, the appellant petitioned that the settlement might be made with him, Sahib Dad Khan verified his statement. The Third Judge, before whom the cause came next in appeal, on the 17th of April recorded his opinion that the decree of the Court below should be affirmed, assuming the following reasons: When in the year 1210 F. S., an Aumeen was deputed into the pergunnas to ascertain who were the rightful proprietors, Sahib Dad Khan excused himself from entering into a settlement, but in collusion with the Aumeen procured a petition to that effect to be presented on behalf of his sister's son, Syud Ali, the appellant, and a settlement to be concluded with that individual for four years. At this juncture the estate fell into arrears, and was advertised for public sale. Syud Ali absconded, and his surety proved insolvent. Under these circumstances the *tehsildar* of the pergunna came upon Sahib Dad Khan, who from the commencement of the transaction appeared as the real proprietor, and he, to prevent the estate from being sold by auction, disposed of it by private sale to Oomaid Mocuddim, for the sum of 311 rupees, applying the amount to the liquidation of the arrears. At that time, however, the name of the purchaser was not registered in the Collector's books, and owing apparently to some enmity that existed between him and the seller, the settlement was made from the year 1213 to the end of 1215, with Moohummud Khan the minor son of Sahib Dad; but in the year 1216, the name of Oomaid was entered in the Collector's books as proprietor of the whole estate. In the year 1220, however, the Collector, without requiring any proof of proprietary right from the appellant, solely on the ground of his name having been formerly registered as proprietor, made him a partner in the settlement concluded with the respondent, from the year 1200 to 1224, without specifying their respective interests. The said appellant, Syud Ali, now claims a right to fifteen *biswas*, but it does not appear on what title his claim is founded. If the statement of his witnesses be correct, to the effect that he derives his right by inheritance from his ancestors, it having been brought into his family by dower, he is entitled to the whole twenty *biswas*. Although Sahib Dad Khan denies that the sale on his part was voluntary, yet it has been proved that the transaction was fair and open, and

1823.

Oomaid, v.
Khyrat Ali

1823. the money paid into the public treasury, and although it has not been accurately established by what means the property became vested in Sahib Dad Khan, yet the witnesses of the appellant Omaid, v. Khyrat Ali. himself admit that it belonged to his ancestors, nor is there any documentary evidence forthcoming to prove that the appellant's family acquired it in right of dower.

The Officiating Judge, however, before whom the cause came to a hearing on the 27th of April, expressed his concurrence in the opinion of the Senior Judge, on the ground that Sahib Dad Khan's possession of mouza Futtihabad, as proprietor, at the time he executed the bill of sale, had not been established, and that no transfer of property could be upheld as good and valid, unless made by the undoubted proprietor. The decree of the Court below was consequently, on the last mentioned date, reversed, and the costs of both Courts were made payable by the respondent.

A petition for the admission of a special appeal from the above decision was presented by Omaid to the Court of Sudder Dewanny Adawlut, and the appeal was admitted by the Officiating and Fourth Judges (C. Smith and S. T. Goad) on the 9th of December 1820, on the grounds that the evidence adduced in the case went to show that Sahib Dad Khan was proprietor of mouza Futtihabad Khujoora, pergunna Dubra Mungulpore, but that from the period of the accession of the Company, he had thought fit, from some private motive of his own, to omit registering his name as such, and had substituted that of his sister's son, Syud Ali, and subsequently that of his own minor son, Moohummud Buksh, as ostensible proprietors; that the name of Omaid, the purchaser, had been registered as proprietor, and that he had paid the purchase money which had gone into the Government treasury. Under these circumstances, it appearing that the seller had no right to cause the insertion of another's name in the books of the Collector, after he himself had parted with the property, the case was considered worthy of further investigation. Shortly after the admission of the appeal, the respondent died, and was succeeded by his son Khyrat Ali, the present respondent. On the 28th of July 1823, the Second Judge (Courtney Smith) recorded his opinion that the view he had taken of the case on issuing the order for the admission of a special appeal had been confirmed by a perusal of the whole of the proceedings of the case. He looked upon it as fully established that Sahib Dad Khan was the original proprietor of the estate in dispute, that he had sold it to the appellant, and had received from him the full amount of the purchase money stipulated, and that Syud Ali, his sister's son, and Moohummud Buksh his minor son, had no proprietary right whatever, and were merely put forward as ostensible owners for a particular purpose. He therefore recorded his opinion that a decree should be passed reversing the decision of the Bareilly Court of appeal, affirming that of the Zillah Court of Cawnpore, making the costs of both Courts payable by the respondent, with mesne profits during the period of his possession. Being joined in the above opinion by the Third Judge (J. T. Shakespear) a final decree was passed accordingly. (a)

(a) In carrying into execution the decree in the above case, some doubts arose as to the proper quarter from which the mesne profits and costs of Courts should

BABOO MOTEE CHUND,

1823.

versus

MOOTEE UBDOOLLAH and others, Respondents.

Aug. 23d.

THE present appellant was formerly plaintiff, and sued the respondents on the 24th of November 1818 in the Bareilly Court of appeal, to recover the sum of 19,046 rupees exclusive of interest. Held that it is not an evasion of the usury regulations for a surety to exact more than the legal interest, on advance of Government revenue made by him, as compensation for his risk; and a claim being preferred for the amount of a debt on bond, exclusive of interest, the Court adjudged, in decreeing the claim, that it was optional with the creditor to take interest at the rate of 12 per cent *per annum*, from the date of plaint to the day of payment, or to institute a fresh suit for interest equal to the principal from the date of the loan.

The plaint set forth, that after Hafiz Abdoollah, and Moohummud Ismael had given the plaintiff a bond bearing date the 1st of *Jummadee Oosmees* 1222, *Hijree*, Mooftee Ghoolam Unbia, their father, executed an accessory obligation, sealed with his own seal, and attested by witnesses in these terms: "It is binding on my sons Hafiz Ubdoolla and Moohummud Ismael, who are the farmers of the villages in the pergunnas of Nujeeabad, Keerutpoor, Mundacoree, and Unbarabad, to pay the sum received by them as a loan from Baboo Ram Churn Das, agent to Baboo Motee Chund; to whom my sons have given a bond promising to pay, after a year and a half; and, I, for the satisfaction of the aforesaid Baboo, and for the payment of the aforesaid sum, have deposited all the title deeds and vouchers of the zemindaree of my villages, and the ground I hold rentfree, and my garden lands, with Moohummud Zuhoor Oolla Khan. This being so, I agree not to sell or mortgage any of my rentfree lands, my orchards, or the villages of my zemindaree, till the sum borrowed be paid. Nor will I in any shape transfer them from my possession to that

be levied. On the decree of the Provincial Court being passed in his favour, Syud Ali was put into possession of the property, and continued for a period of nine months so seized, until ousted by order of the Sudder Dewanny Adawlut. One Jyegovind was surety for Syud Ali, both with respect to the costs incurred in the Zillah and Provincial Courts, and the mesne profits during the period he was in possession under the condition that the Zillah decree should be affirmed by order of the Provincial Court. A reference was made to the Court of Sudder Dewanny Adawlut, as to whether the estate of the deceased or the surety should be liable. It appeared on investigation, however, that Jyegovind was not responsible for any thing, as the decree of the Zillah Court adjudging him and his principal to pay the costs had been reversed by the Provincial Court, and as his principal did not obtain possession of the lands under his security until after it was awarded to him by order of the Provincial Court. On the 15th of December 1826, (present C. Smith, Second Judge) a final order was issued that the former surety (Jyegovind) should be absolved from all responsibility, and that the required assets should be realized from the estate of his principal, the late Syud Ali. This order may be held to settle an important question with respect to the payment of costs and mesne profits, and to establish a precedent, that a surety having made himself responsible for costs and mesne profits, provided the Zillah decree should be affirmed by the Court of Appeal, and the latter Court having reversed the Zillah decree, such surety is no longer responsible, though by the ultimate decision of the Sudder Dewanny Adawlut, it would appear that they should have been discharged by him originally. Precedents to show what had been the practice in former and similar cases were searched for in vain, there not appearing to have been any case in point where the Court of appeal had, in ignorance of a special appeal having been preferred to the superior Court, reversed the decree of the Court below, and put the appellant to their Court in possession, the surety having rendered himself answerable for the result of the appeal to that Court only, and where the decree of that Court was reversed by the Sudder Dewanny Adawlut on further appeal, the party ultimately cast having been turned out of possession again pending the appeal, and dying before the final decision.

1823. of any other person. If I should do any of these things, the act shall be null and void, and if my sons should not pay the sum as they have agreed, I, either by selling, or mortgaging, or farming the villages of my zemindaree and the lands, (the title deeds of which have been deposited and are now a security for payment of the debt) will, without fail, pay to the aforesaid Baboo as I best can, whatever I may realize from either of the three methods of disposal above specified." On this Moohummud Zuhoor Oollah Khan gave a voucher in the shape of a memorandum (acknowledging the receipt of the title deeds adverted to in the preceding agreement), on the 15th of December 1807, and after his death Moohummud Hubeesboodeen, his heir and representative, executed an acknowledgment undertaking to see that all the stipulations entered into with the plaintiff were carried into effect; notwithstanding which, and although the period fixed for the repayment had long elapsed, the defendants refused to liquidate the plaintiff's demand.

Baboo Mo-
tee Chund,
v. Mooftee
Ubdoollah
and others.

The defendants, Mooftee Moohummud Ubdoolla and Moohummud Ismael, alleged in reply, that at the time they executed the bond they had not clearly defined or understood the terms on which the calculation of the debt was made, but that the agent of the plaintiff postponing the explanation of the points on which they had professed doubt, till a future time, got them to put their names to it, and from the accounts which were furnished of the balance between the parties (one copy of which with the aforesaid agent's signature annexed, they have by them, and another copy with the signature of Ubdoolla, one of the defendants, the agent retained) it is evident that the pecuniary transactions can only be cleared up by an adjustment of the accounts of the years 1214 and 1215 *Fuslee*. So that without such adjustment, the bond is nugatory, as by the calculations in the aforementioned accounts it would be found that the defendants were absolved from all claims of the plaintiff; and indeed that there was a considerable balance in their favour; and even should the bond be held, on the plaintiff's words, as a good one, and binding on the defendants, apart from any consideration of the payment of the balance in question, the 8th clause of the 34th regulation 1803, requires that the plaintiff's case should be dismissed, as it would appear from the accounts signed by the plaintiff's agent that he (the agent) thinking to evade the regulations of Government on the subject of exorbitant interest, had taken thousands of rupees under the pretence of a depreciation in the value of the coin and other devices expressly forbidden. Moreover that, after the date of the bond up to the conclusion of their transactions with the plaintiff, the sum of 133,340 rupees had been realized from the revenue of the zemindarees and other property of the defendants, which, with 22,107 rupees, and gold and silver ornaments, had been deposited with the agents of the plaintiff, as could be proved by the acknowledgment signed by him. So that, altogether, what with goods and what with money, he had received 155,447 rupees; and subsequently they, the defendants, being engaged with their pecuniary transactions in the Collector's office, and in straits with regard to rents, and the plaintiff having moved from Moradabad, were

prevented for some time from bringing forward a claim for the balance owing to them. At last, when they were free to urge their claim, the plaintiff anticipating them, had instituted this action on the ground of the bond, which (like other bonds which the plaintiff had been in the habit of receiving from them and not returning after the debt was discharged) had not been cancelled, but had remained in the possession of the plaintiff. Assuredly, were the original ledgers and account books of the plaintiff, together with the accounts of Ubdoolla from the commencement of their transactions with each other to be produced, the extent and nature of their payments and of the balance with had been adverted to would be fully developed. And (continued the defendants) was it to be believed that the plaintiff, had the undertaking alleged to have been executed by Mooftee Ghoolam Unbia been still in force, would in default of payment, have omitted to seek redress till nearly 12 years had elapsed from the time of its being due. On these grounds the defendants trusted that the Court, balancing the accounts of former and present loans and payments, and ascertaining the truth of the arguments urged on either side, would adjudge to them whatever balance was found to be due.

1823.
Baboo Mo-
tee Chnud,
v. Mooftee
Ubdoollah
and others.

The defendant, Mooftee Ghulam Unbia replied, that since the plaintiff had taken and been satisfied with property to a greater amount than the sum specified in the bond; and, in addition, a large sum of money had been paid by his sons into the house of the plaintiff; and thereby more than the amount specified in the bond had been realized, the conditions of the undertaking executed by him had been fulfilled. The fourth defendant, Moohummud Hubeeboodeen suffered judgment to go by default.

The case came to a hearing before the Senior Judge of the Bareilly Court of Appeal, on the 2nd of October 1820, who dismissed the claim on the ground that the evidence adduced by the defendants was stronger than that for the plaintiff, and that the delay of the plaintiff in bringing forward his claim till more than eleven years had past, when he had it in his power, and when the defendants were constantly at Moradabad, raised a presumption against him. The plaintiff was ordered to pay all costs.

The plaintiff being dissatisfied with the above decree appealed to the Sudder Dewanny Adawlut.

On the 13th of August 1823, the Second Judge (C. Smith) recorded his opinion that, for several reasons, a decree should be given in favour of the appellant; first, it appeared clearly that it was binding upon Mooftee Ubdoolla and Moohummud Ismael to pay the debt claimed by the appellant, from the papers enumerated below. the authenticity of which was allowed by both parties. The bond dated the 1st of *Jummadee Oosanee* 1223, A. H. for 19,046 rupees, being the balance of accounts for the year 1214 F. S., executed by Mooftee Ubdoolla and Moohummud Ismael, the respondents, and an undertaking of the same date as the above entered into by the respondent Mooftee Ghulam Unbia; and an agreement dated the 25th *Jummadee Oosanee* 1223, A. H. signed by Moohummud Hubeeboodeen, the absent respondent,

1823. and a memorandum written by Zuhoor Oolla Khan on the 13th *Shuwal* 1222, A. H.; secondly, because the appellant was a man in all respects trustworthy, and one of the principal bankers of Benares; thirdly, because the account books of the house at Nujeebabad and Moradabad which were produced by the appellant in the Court of Bareilly had all been found exact and made up according to the forms of banking; fourthly, because the declarations of the appellant and the accounts adduced by him had been confirmed and established by the evidence in another case, and the copies of that evidence filed in the case of these proceedings; fifthly, that from an inspection of the accounts of the year 1215 F. S., it had by no means been ascertained that any balance remained in favour of Mooftee Ubdoolah and Moohummud Ismael; on the contrary, it is certain that the balance is in favour of the appellant; sixthly, that the agreement said to be written by Ram Churrun Das, and Ram Suhai the agent, dated the 17th of *Suffer* 1223, A. H. regarding property deposited to the value of 22,107 rupees, with the documents purporting to be a list of the articles deposited, dated the 29th of *Shuwal* 1222, A. H. and the statement of the whole debt, the payments and the balances, these, one and all, appeared to be sheer forgeries, as they did not coincide with the general tenour of the intercourse between the parties, and had been entirely disproved by the appellant and the witnesses adduced by him; besides, no mention of them was to be found in the account books of the appellant, whose character for integrity was before adverted to; seventhly, with respect to two items of payment into the treasury of the Collector, although it was true they were entered in the name of Mooftee Ubdoolah, still it was by no means proved that he did not receive those sums in the same way, as he had other monies from the house of the appellant, before he paid them into the office of the Collector. In fact, it was evident from a comparison of the books of the appellant and the dates of the issuing of the money for the respondent's rent from his house, with the view to their being paid into the Collector's hands, that the two sums in question being so issued and paid were entered against the respondent's name on the credit side of his, the appellant's accounts. And besides, from the papers filed in the Bareilly Court, and the translation (made here) of the Hindee memorandums of Joogul Kishor former treasurer of Moradabad, signed by the Collector of that district, seemed to confirm his declaration, and to refute that of the respondents in the matter of the sums in dispute. And it was easy to get the statement forward with these sums written as if they were sent from Mooftee Ubdoolah without any mention of the agency of the appellant's establishment; in truth, it was necessary to do so, in consequence of the terms of the Collector's order: eighthly, the arguments of the respondents about the interest of the money, the pretences of its being unlawful, and other trifling points, received no confirmation from the books of the appellant or the evidence of the witnesses; and it in no respect appeared that the appellant had charged interest contrary to the provisions of regulation 34, 1803, which had been referred to: as to any stipulations on account of *batta*, charges of surety, agency allowance, or other matters, all that depended on the private agreement made between the parties;

Baboo Mo-
tee Chund,
v. Mooftee
Ubdoolah
and others.

the terms of which did not appear to have been infringed by the appellant on the occasion. Moreover (observed the Second Judge) he who stands security for another for the payment of large sums to Government, who never remit an iota of their dues, would need to have the prospect of some profit for himself, and is clearly entitled to some compensation in lieu of his security; nor is it any one's duty to endanger his own interests in order to benefit those of another; ninthly, the declaration of the respondents, that 133,340 rupees had been paid into the house of the appellant on their account from the produce of Mujeehabad, Keerutpore, Nundawur and Ukburabad is not to be relied on, since little confidence can be placed in the abstract produced by them, and much on the account books of the appellant; moreover, it appears from other papers filed in the case, that Mooftee Ubdoolia himself, in reply to a *purwanna* which had been issued from the Collector's office for the settlement of the abovementioned villages, stated that the gross produce of them amounted to only 111,082 rupees in the year 1215 *Fuslee*; and it is obvious that it were impossible to pay more into the office of the appellant from these villages than the whole gross produce amounts to; tenthly, twelve years had not elapsed between the entering the plaint and the date of the transactions, and it would be gross injustice to refuse to hear the appellant's claim, because, trusting to the honesty of the respondents for repayment, he had kept himself free from the annoyances of a lawsuit for ten or eleven years. In short, from the tenour of all the documents filed and the arguments used, nothing could be found but accuracy in the accounts of the appellant, and fraud and want of faith on the part of the respondents. The connection of the respondent, Mooftee Ghoolam Unbia with this case, as security for the bond dated the 1st of *Jumadee Oosanee* 1222, F. S., is established by his own deed. The connection of Hubeeb-oo Deen, the absent respondent, with this case is, that he, after the death of his relation Zuhooroolia Khan, the original holder of these securities, gave an acknowledgment of having in his possession the said vouchers. The Second Judge concluded by recording his opinion to the following effect: That a decree be passed in favour of the appellant reversing that of the First Judge of the Court of Barsilly, dated the 2nd of October 1820, and that the appellant recover from Mooftee Ubdoolia and Moohummud Ismael the sum of 19,046 rupees, the original amount specified in the bond dated the 1st of *Jumadee Oosanee* 1222, F. S. with interest on it at the rate of twelve per cent per annum from the date of his instituting this claim up to the date of payment; and in case the respondents do not make good the payment, he (the appellant) should obtain it from a sale of their property, and that of the respondent Mooftee Ghoolam Unbia, according to the provisions of his own undertaking. It should be binding also on Hubeeb-oo Deen, the absent respondent, not to give up the documents entrusted to him into the hands of either party till the whole sum mentioned in the decree be paid. When that sum is paid, he should, with the consent of the Court previously obtained, return those documents to Mooftee Ghoolam Unbia and Mooftee Ubdoolia Khan and Moohum-

1823.

Baboo Mo-
tee Chund,
v. Mooftee
Ubdoolia
and others.

muñ Ismael, who should pay all the costs of suit. And with reference to the interest, it should be left to the option of the appellant, either to take it at the rate and for the time above mentioned, or to bring a new suit to obtain interest equal to the principal, that is to say, for interest from the commencement of the loan till a hundred months subsequent to it.

On the 23d of August of the same year the Third Judge (J. Shakespear) having expressed his entire concurrence in the above opinion, a final decree was passed accordingly.

1823.

SONA RAM SARMA, Appellant,

versus

Sept. 4th.

RAM RUTTUN SARMA, and others, Respondents.

Judgment of the Sudder Dewanny Adawlut declared conclusive against two interlocutory claimants, their claim virtually rejected by the Zillah decree, not having been brought forward on appeal to the Provincial Court, nor supported by a separate action.

THE appellant sued on the 27th of May 1817, in conjunction with Golok Chandra, and Nityanund Sarma for possession as superintendants (*Adhikarees*) of a five and a half ana share in the *dewutter* lands and edifices (a) appertaining to the idol *Gopinath*, or *Krishna*, and in the other perquisites of that priesthood; the claim being estimated under the regulations at 12,372 rupees; representing that of the entire appropriation, which was held jointly in right of inheritance by themselves and one Kunjkisor, son and heir of Krishna Kinkar, their sacrificial attendants (*Pujaris*) had, under a summary judgment, obtained possession of an eleven ana share, of which they, the plaintiffs, now claimed to recover their moiety.

The defendants maintained that the eleven ana share had been allotted to their ancestors by the original grantee, in consideration of the established duties to be performed by them; and that the right of the superintending priests was restricted to the portion still in their possession.

On the 9th of May 1819, Mr. E. J. Harington, Additional Registrar of Mymensingh, stationed in pergunnah Sheerpoor, finding that the entire establishment had been formerly adjudged to Krishna Kinkar, whose descendants were not a party to the present suit, dismissed the claim with costs as irregular.

The Senior Judge of the Dacca Provincial Court confirmed this decision on the 3d of March 1820, leaving Golok Chandra and Nityanund to institute a suit on the specific ground of hereditary right. He held that Sona Ram having, on the 21st of September 1817, when questioned by the Zillah Judge, admitted his execution of a paper purporting to be a deed of compromise between the superintending priests, the sacrificial attendants, and the trustees of the establishment in question, bearing date the 6th of *Sawun* 1216, B. S., was thereby debarred from all further claim.

Sona Ram applied to this Court for the admission of a special appeal, alleging that he had mistaken the above document, which, in point of fact, was a forgery, for one of his own exhibits, and his petition was granted in conformity with the orders

(a) Situated near Mouza Achamita, Tuppa Hajaradi.

of the then Officiating and Fourth Judges (C. Smith and S. T. Goad) given on the 25th of May, and 10th of June 1820; it appearing that Kunjkisor, the son and heir of Krishna Kinkar, had originally joined with the appellant against Ram Ruttun and his party in a summary suit for possession as *Adhikarees*, and that this action proving successful, the latter had brought forward another of the same description for their rights as *Pujaris*, in which they obtained judgment against both those persons, plainly shewing their joint interests in the superintendence. It was also observed, that no witnesses had been examined before either of the lower Courts, to ascertain in whose hands possession had actually been vested, and that, setting aside the doubtful nature of the plea relative to the alleged agreement, it had decidedly never been admitted by his partners.

Sona Ram
Sarma, v.
Ram Rut-
tun Sarma
and others.

Sona Ram dying at this stage of the proceedings, was succeeded by his sons Jagannath and Gourkisor.

A petition was subsequently given in, on behalf of two females, Kisori and Krishnomuni Dibya, widows of Gour Chandra, and Suroop Chandra, *Gosains* of Darca, setting forth that they were the proprietors of the establishment in dispute, and as such had invariably received the usual dues, that they now tendered for inspection original grants, by which, and by the deed of compromise alluded to by the Provincial Court, their claim would be fully established, and that they had indeed opposed the suit when pending in Zillah Mymensingh.

None of these documents were deemed authentic by the Second Judge (C. Smith), who further remarked, that the interlocutory claimants being in the situation of defendants, should have produced them in the lower Courts; that in addition to the proofs already noticed, it was shown by a recent Zillah decision of the 25th of April 1821, in another cause between the same parties, that the successor of Krishna Kinkar, who was entitled to hold the entire appropriation under the decree of a former authority (*b*) passed on the 31st of May 1779, A. D., admitted the claim both of Sona Ram and of his co-partners; that it was allowed on all sides that the grandfathers of Kunjkisor and of Sona Ram were full brothers, and that in the registry of the lands made by these two in the Collector's office in 1202, B. S., as their joint tenure, no other interests were mentioned, nor had, any one appeared to oppose that registry.

In conclusion, the Second Judge, after animadverting on the orders of the Provincial Court, in declining to take cognizance of the claim of the appellant's partners, and thereby subjecting them to the expence of a fresh suit, recorded his opinion that in confirmation of the Zillah decree of 1779, A. D., judgment should be given for the original plaintiffs to the extent of their claim with full costs; and that in consideration of the default of the interlocutory claimants, who had neglected to support their alleged rights in the lower Courts, the decree should be made decisive against them, as well as against the original defendants.

The Third Judge (J. Shakespear) after the fullest inquiry into

(b) Mr. G. Hatch, then Superintendent of the Civil Court.

1823.

Sona Ram
Sarma, v.
Ram Ruttun
Sarma
and others.

the merits of the pretended deed of compromise, concurring generally in the above opinion, passed an order reversing, in conformity with it, the decrees of the Provincial and Zillah Courts; considering, however, that the two interlocutory claimants were not regularly before the Court as defendants, he thought that no order should be passed on their claim.

The Fifth Judge (W. B. Martin) to whom this last point was afterwards referred, agreed with the Second Judge, that the persons in question having absented themselves from the Provincial Court, after that their claim had been virtually disallowed by the Zillah Court, and their title deeds having been taken into consideration by the Second Judge, they could not, with propriety, be exempted from the operation of this Court's decision. A final order was passed accordingly.

1823.

Nov. 29th.

RAJ CHUNDER RAI, Appellant,

versus

RAM HUREE GHOSAL, Respondent.

Judgment by a Zillah Court for principal and interest of a bond debt, together with interest on the aggregate sum from the date of suit, confirmed on appeal to the Provincial Court, with interest on the amount of the judgment, but interest while the cause was pending on special appeal before the Sudder Dewanny Adawlut calculated on the amount of the original bond only.

THIS was an action brought by the respondent to recover five hundred rupees on a bond bearing date the 25th *Baisakh* 1217, B S. and three hundred and forty rupees as interest to the month of *Aghun* 1222, or about a month before the 12th of January 1816, when this suit was instituted in Zillah Nuddea.

On the 2nd of August following, the defendant failing to appear, and his execution of the bond having been proved by one of the witnesses to it, and by another individual, a decree was passed for the sum claimed, or eight hundred and forty rupees, with interest from the date of plaint and all costs.

An appeal by the defendant to the Calcutta Provincial Court, was finally dismissed on the 9th of February 1820, by the Fourth Judge, joining in an opinion recorded by the Third Judge, on the 13th of September of the preceding year; the appellant being made liable for costs, and for interest on the amount of the previous judgment.

On the application of Raj Chander, who denied the debt *in toto*, orders for the admission of a special appeal were passed by the Acting and Fourth Judges of this Court (C. Smith and S. T. Goad) on the 14th of August, and 9th of September 1820, the latter concurring with the former Judge, that as it appeared that the respondent had declined making oath before the Provincial Court to the justice of his claim, although he had deposed to that effect before the Zillah Judge on solemn declaration, but not in the presence of the other party, and as the Provincial Court had considered the previous evidence insufficient, they should have called upon the respondent who had failed to serve the *subpana* on two out of the three witnesses mentioned in the bond, to furnish the necessary affidavit for enforcing their attendance, under the provisions of section 6, regulation 4, 1793; his own deposition not being admissible in proof of the claim.

When the cause came forward, on the 13th of January 1823, before the Third Judge (S. T. Goad) and the Officiating Judge (W. Dorin), an order was issued to the Provincial Court to follow the mode of proceeding above specified, and to forward the examinations of the required witnesses to this Court. Perusal of the papers was postponed for the evidence in question, which appeared essential to the final decision. 1823.
Raj Chunder Rai, s.
Ram Huree Ghosal.

The cause was next taken up by the Second Judge (C. Smith), who, understanding that the witnesses had been summoned by a notice affixed to their family dwelling, but had not attended, and the appellant admitting that they were his first cousins, gave orders for them to be seized by the Zillah Judge, and fined in the sum of 500 rupees each.

The required witnesses having subsequently appeared in Court, obtained a remission of the fine, on their petition, stating that they had never been informed of the service of the notice, and that, on the contrary, the respondent, who resided near their present abode at Patharia Ghat, in Calcutta, had uniformly dispensed with their testimony.

Their depositions, taken under a solemn declaration, as authorized by the regulation above cited, proving sufficient, when weighed with the other evidence, to establish the respondent's claim, under the bond, and fully supporting the opinion expressed by the Third Judge of the Calcutta Court, that these persons were influenced by their relationship to the appellant, the Second Judge, considering that a special appeal would never have been admitted if their evidence had been before the Court, passed a final order confirming with costs the decrees of the lower Courts.

The above order, however, containing no specification of interest, an application upon this point was subsequently brought before the Second Judge, who observed that the Provincial Court had decreed to the respondent interest on the aggregate amount of the Zillah decree for both principal and interest of the original claim, and that this was in conformity with section 3, regulation 13, 1796; that the appeal to the Provincial Court, however, in which the defendant had exercised his own discretion, was altogether different from a special appeal, which being inadmissible without the opinion of two Judges, could not with propriety be designated a litigious appeal, to which description of case the rule in question, enacted previously to the introduction of special appeals, was understood to have reference. He therefore ordered that for the period during which the special appeal had been pending in this Court, the respondent should recover interest on the principal sum of 500 rupees only.

1823.

BABOO JANKEE PERSHAD, Appellant,

versus

Dec. 19th.

MAHARAJA OODWUNT NARAIN SING, Respondent.

Held that according to the spirit of section 6, regulation 15, 1793, the Courts may award interest exceeding the principal of a debt, if the excess accrued *pendente lite*, and without any fault of the creditor.

THE appellant brought this action in the City Court of Benares on the 13th of January 1808, to recover from the respondent the sum of 27,000 rupees principal, and 5,733. 15. 3. interest, in all 32,733. 15. 3. It was set forth in the plaint, that the above sum was due to the plaintiff, under a bond bearing date the 24th of Cheit 1213, F. S., and that the suit was brought in consequence of the defendant's refusing to liquidate the debt, although the period specified in the bond had expired, and repeated applications had been made to him for the money.

The defendant, in reply, denied the truth of the statement of the plaintiff, and affirmed that Deokinundun Sing, father of the plaintiff, had received the money due on account of the abovementioned bond, but that on the respondent's requiring of him an acknowledgment of the discharge of the debt, and requesting that the bond might be returned to him, he first made frivolous excuses, and had at length preferred this suit under his son's name; that the plaintiff did not explain whether the sum alleged to be due was given to the defendant in cash, or whether it was paid on account of his having become security, or to enable the defendant to pay his rents, or for what other purposes; nor whether it was given at one or at several times, on what dates, in whose presence, and through whom; all which circumstances should be detailed, in order that a distinct reply might be given; that it would appear the transaction regarding this large sum took place between the defendant and Deokinundun Sing, father of the plaintiff; and that the whole of the money was repaid by his servants into the house of Deokinundun Sing, which was known by the name of the house of Gouree Shunkur and Jankee Pershad, and that this would be evident from the papers of both parties.

The plaintiff in his rejoinder stated, that of the money due by the above bond not a *cowrie* had been paid; that if it had, of course the Rajah would hold some receipt or other acknowledgment of the payment, which he might produce, or he would have received back the bond itself.

The defendant in his final reply, affirmed that in the accounts given in by Deokinundun Sing under his own signature to the Commissioners, the sum of 27,000 rupees, which the plaintiff claimed as due to him, was mentioned, and that it was stated therein that the defendant had no farther accounts with him; that moreover the money due on account of many bonds given by the defendant had been repaid without the defendant's receiving back the bonds, as would appear on an inspection of the above accounts; that Deokinundun Sing in the balance sheet of those accounts; had moreover acknowledged that the sum of 7,000 rupees only remained due from the defendant, and that it was therefore difficult to say whence this bond originated, by virtue of which the plaintiff had preferred his claim.

The papers relative to this case, agreeably to regulation 13, 1808,

were sent from the City Court to the Provincial Court of Benares. and on the 5th of July 1816, the Second Judge of that Court, on the grounds stated in his decree, considering the claim of the plaintiff invalid, dismissed the cause, and made the costs payable by the plaintiff. The plaintiff appealed from the above decision to the Court of Sudder Dewanny Adawlut, and the case was brought forward on the 1st and 2nd of May 1820, before the then First and Fourth Judges (J. Fendall and S. T. Goad). After reading all the papers, the following order was passed : It appeared that the respondent had affirmed that he had an account with the appellant, which ran on from year to year, and that he had given in the names of witnesses to prove the receipt of the money claimed on account of the bond ; that the Court below did not hear their depositions, which was necessary in order to ascertain the truth of the reply of the respondent, and that it was also necessary to look over the whole of the accounts between the parties from the time of its commencement to its close. The decision of the case was therefore deferred, and a copy of the above order was sent to the Provincial Court, with a precept directing them to summon the witnesses named by the respondent, and to take their depositions in the presence of the parties or their pleaders, also to send for the original books of accounts of the appellant in Benares and Allahabad, from the commencement of the transactions between the appellant and respondent up to their close ; and having taken an exact copy of them, and affixed their signatures to the same, to send it together with the depositions of the witnesses, to this Court within the time prescribed. On a complete return being made by the Provincial Court, the case was again brought forward on the 23d of May 1822, before the former Fourth Judge, then Third Judge (S. T. Goad), and an order was passed to this effect : On reading all the papers, it appears that the principle on which the Provincial Court proceeded in deciding the case, by looking over the accounts of the parties from the commencement to the termination of the transactions between them, and by striking out such items as appeared to them not to merit repayment, or for which no consideration had been received, was incorrect, and could not be upheld ; inasmuch as the claim of the appellant was founded on a bond acknowledged by the respondent for 27,000 rupees, under date the 21th *Cheit* 1213, F. S. Had no other document but the accounts been in existence, this way of deciding the cause would have been correct ; but as the appellant brings forward a bond, and proves the respondent to have received the sum therein mentioned, and the respondent is unable to prove that the money borrowed was repaid, it is clear that repayment of that particular sum should have been at once adjudged, without reference to the other accounts that may have existed between the parties ; for the Court's considering many of the disputed items in the accounts as not fit to be repaid appears to be quite an arbitrary proceeding : whether the sums were appropriated to proper or improper purposes the defendant had borrowed the money, and the plaintiff had nothing to do with the manner in which it was expended. With reference to the sums which the father of the plaintiff might have received from the defendant for

1823.

Baboo Jan-
kee Per-
shad, v.
Maharaja
Oodwunt
Narain
Singh.

1823. resigning the office of *tehsildar* of the *pergunnah*, &c. they were private transactions between the parties, and if Oodwunt Narain Singh pleased to remunerate him for resigning the *tehsildaree*, he was at liberty to do so : on these considerations the Fourth Judge recorded his opinion, that there appeared to be no sufficient ground for affirming the decision of the Benares Court of Appeal, and that a decree should be passed in favour of the appellant for the sum due as specified in the bond dated the 24th of *Cheit* 1213, F. S., namely 27,000 rupees principal, and interest at the rate of 12 *per cent per annum* from the date of the bond up to the date of payment, and that the costs of both Courts should be made payable by the respondent.

Bahoo Jan-
kee Per-
shad, v.
Maharaja
Oodwunt
Narain
Singh.

The cause was again brought forward on the 3d of March 1823, before the Fourth Judge (W. Dorin). He expressed his concurrence with the late Third Judge, since deceased. The authenticity of the accounts brought forward he did not consider sufficiently established, and it had on a former occasion been determined that the uncorroborated account books of a native banker are not of themselves sufficient evidence to guide a Court of justice in its decision (c). He observed that the Judge of the Court of Benares had made his decision, setting aside the claim of the plaintiff, upon the grounds of the accuracy of these accounts, striking out therefrom items amounting together to 20,000 rupees, and interest amounting to the same sum, affirming them to have been given as bribes; on the principle that if a banker by the direction of one his constituents pay a sum of money to a third person for any unlawful purpose, or as a bribe, the money so paid still remains due to the constituent from the banker; and, in their view to the good of the country and the prevention of bribery, if it was clear that a banker was perfectly aware at the time that he was giving money on account of a bribe, and was thus an accomplice in giving it, in case of the constituent denying the claim of the banker, such claim ought to be rejected by a Court of justice, although the denial would involve a breach of faith. In this view of the law the Fourth Judge concurred, but he observed that sufficient proof must be brought of the bribe being actually given, as well as of the banker's being privy and accessory thereto, neither of which points was here ascertained. Considering all the circumstances of the case, he stated his opinion, that the judgment of the Court below should be reversed, that the amount due agreeably to the bond, together with interest, should be awarded to the plaintiff, and that the costs of both Courts should be paid by the respondent. In this view of the case the Third Judge (J. T. Shakespear) expressed his entire concurrence; but as both he and the Fourth Judge entertained doubts as to the amount of interest which should be awarded to the appellant, the point was reserved for the consideration of a full Court. The question was brought before his colleagues by the Third Judge (the Fourth being at the time absent) in the following minute: The Fourth Judge and myself have agreed to decree the principal claimed on a bond produced by the

(c) See the case of Bunsce Dhur Nundee, appellant, *versus* Mirza Moohummud Shureef, vol. 2, page 271.

appellant in this suit, and we wish to have the opinion of the Court in respect to the amount of interest which we ought to award. Our late Third Judge, Mr. Goad, proposed to decree the amount claimed on the bond with interest from the date of its execution to the date on which it may be liquidated by the Raja. This also is my view of the case, but the Fourth Judge entertains doubts whether we are competent, with reference to regulation 15, 1793, to decree so large an amount in the shape of interest. The suit was instituted in the Benares Court of Appeal on the 13th of January 1808, and it has been pending in the Courts therefore for upwards of sixteen years. Now it seems hard that the appellant should, through no fault of his own, be subjected to the loss of the interest to which he is entitled on the principal sum, which we propose to decree to him.

1823.

Baboo Jan-
kee Per-
shad, r.
Maharaja
Oodwunt
Narain
Singh.

By the accompanying report from our *serishtadar* some decisions have been passed in this Court which appear to be in favour of our competency to decree the full amount of interest, and the reason of the thing is clearly in support of this construction.

Date of bond, 28th of March 1806; suit filed 13th of January 1808:

Claim in Court of Appeal	{	Principal	Rs	27,005	0	0
		Interest		5,733	15	9

Decree of Court of Appeal passed on the 5th of January 1816.

Interest at one *per cent per mensem* on Rs. 27,005

from the 28th of March 1806, to date of Sudder

decree (8th of March 1823) or for sixteen years,

eleven months and eleven days, is 54,919 3 2½

Principal of the bond 27,005 0 0

Total Rs. 81,924 3 2½

The Chief Judge (W. Leycester) stated his opinion, that in passing a decision in favour of a man claiming under a bond, the regulations in their letter and spirit restrict the Court from giving interest beyond the principal.

The Second Judge considered that regulation 15, 1793, could not apply to this case, the bond being dated March 1806, and regulation 15, 1793, not extending to Benares till the 1st of January 1807, see regulation 17, of 1806. Upon the general question he declined giving any opinion, as it arose immediately out of a case decided by him at Benares. The Fifth Judge (W. B. Martin) was of opinion that the restriction contained in section 6, regulation 15, 1793, was too express and positive to admit of granting a larger sum for interest, than the amount of the principal; and the Officiating Judge (J. H. Harington) recorded the following minute on the occasion: It is provided in section 6, regulation 15, 1793, (extended to Benares by regulation 17, 1806, and to the Ceded and Conquered Provinces by regulations 34, 1803, and 8, 1805) that "If the interest on any debt, calculating according to the rates allowed by this regulation, shall have accumulated so as to exceed the principal, the Courts are not, in any cases whatever (excepting the cases specified in section 12) to decree a greater sum for interest than the amount of such principal. It appears to be a question of construction before the Court, whether the restriction

1823. imposed upon the Courts by this rule applies only to the accumulation of interest before a suit for the principal and interest is instituted; or whether it is also applicable to the further accumulation of interest whilst the suit may be depending before the Court in which it is originally preferred, or to which it may be brought in appeal, previous to a judgment in favour of the claimant. In an appealed cause, decided by Mr. Fombelle and myself, on the 15th July 1808, (a) we construed the regulation in question, considered with the merits of the case, to warrant a judgment in favour of the plaintiff, for the principal of a bond debt, amounting to 5,000 rupees, due on a bond dated so far back as the 9th of March 1793, and interest from the date of the bond, to that on which the final decree should be carried into execution. In this case the interest, on the institution of the suit, in June 1795, amounted to 1,258 rupees only; but from the length of time during which it was depending in the Patna City Court, the Provincial Court, and the Sudder Dewanny Adawlut, the interest, when the final judgment was given, at the stipulated rate of one *per cent per mensem*, exceeded the principal. I do not recollect whether any discussion of the construction given by us to section 6, regulation 15, 1793, took place at the time, before the other Judges of the Court (though I think it probable, from our usual practice, that this may have been the case;) but the following remark, which I believe was added by me to the printed report of the case, will shew in what view we considered the judgment given by us to be equitable, and consistent with the restriction contained in regulation 15, 1793. "The plaintiff in this case sued for principal and interest of the sum due to him, and calculated the interest up to the time of his plaint. This was all he could be expected to do; and there was evidently no just reason for depriving him of the further interest which became due, under the defendant's denial of his claim, during the long period it was under investigation. He might perhaps have acquiesced in the judgment of the City Court, if the defendant had not appealed, but having been kept out of the receipt of his money by two appeals, the Sudder Dewanny Adawlut considered it just to let him receive the full benefit of the Appeal to that Court. It may be added, that the restriction contained in section 6, regulation 15, 1793, against a judgment for interest, exceeding the amount of the principal, when the legal interest shall have accumulated so as to exceed the principal, was not applicable in the present instance, wherein the accumulation was subsequent to the institution of the suit, and not ascribable in any degree to procrastination on the part of the creditor." On full consideration of the question, I see no sufficient reason to alter the construction then given to the regulation adverted to: provided, that when there is no express stipulation for interest between the parties, it be understood that the judgment for accumulated interest to the date of the decree is not a matter of ordinary course and obligatory upon the Courts; but within the exercise of a just discretion of the Court giving judgment, when it may appear equitable to allow the full interest due. At the same time, I must acknowledge that the letter of the rule, without any provision for

(a) Vide vol. 1, page 242.

the accumulated interest whilst the suit is depending, appears to 1823.
favour the construction, that it was meant to restrict the Courts
from adjudging, in the first instance, a greater sum for interest Baboo Jai-
than the amount of the principal, whether the accumulation of kee Per-
interest be antecedent, or subsequent to the institution of the claim. shaud, v.
It was finally resolved, on the 19th of December 1823, by a majority Maharaja
of the Court present, namely, the Second, Third, and Officiating Oodwunt
Judges (the First and Fifth dissenting) on consideration of the Narain
terms of section 6, regulation 15, 1793, and of the precedent esta- Singh.
blished by the decree of two of the Judges of this Court, in the
cause Mussumaut Mukhun, appellant, versus Mohunt Ramper-
shaud, respondent, decided on the 15th of July 1808, that it was
proper to adhere to the construction of the regulation abovementioned
adopted in this decision, and a decree was ultimately passed
awarding to the appellant the full amount of interest as proposed
by the late Judge (S. T. Goad.)

CHUNDUN KOONWAREE, Appellant,

1823.

versus

SHEO RATNA SINGH, and others, Respondents.

Dec. 22nd.

THE original plaintiff in this case was the appellant's husband Claim to
Ram Jeawun Singh. He sued in the Benares Provincial Court, an estate
on the 9th of November 1812, for possession of the *maafee* or by an *elder*
rent free Mouza Pipari in Chunargurh, affording a decennial pro- of the de-
duce of 12,000 rupees, the property of the late Baboo Baij Nath ceased pro-
Singh, of whom he styled himself the son, and under a deed of prietor un-
gift from whom, he stated, that he had held the estate during der an alle-
the administration of Cheyt Singh. Basi Thakurain, in conjunction ged deed of
with the other widows of the said deceased, having executed gift. Suit
on the 28th *Pooas* 1841, S. S., an acknowledgment of his title, which dismissed
was submitted for the signature of Mr. Fowke and of the Nawab with costs,
Ibrahim Khan, the former, on his discharging the sum of 44,750 as the do-
rupees, due to Government from the estate, had bestowed on him cument had
a fresh hereditary grant. The principal widow, however, had not been
afterwards sued him for the whole property, and although he gave produced
in an answer setting forth the above fact, she had obtained in a former
judgment in her favour, by laying before the Resident a forged action
relinquishment by him, of all claim to the estate, which Mr Fowke brought by
had forwarded to the Nawab : but on the plaintiff's attending and the widow
making exertions to bring about an investigation into her conduct, against the
she had induced him to desist, as well by her personal entreaties as present
by the intercession of the leading persons of the place, and in the claimant,
Hijree year 1209, had executed a final conveyance of her title when, on
to him. his plea of
adoption
proving
untenable,
a deed had
been filed
in Court,
by which
he admit-
ted her
right to the
succession,
which deed,
although

The mouza had in consequence remained in his hands, but
Harakh Chandra and Raj Chandra, in collusion with the widow,
had brought a summary suit, alleging that they held it in mortgage
from her, and the zillah order in their favour having been con-
firmed by the Provincial Court, he was under the necessity of
preferring the present action against all three of them.

1823.

now dis-
claimed by
him, had
been duly
recorded,
and carried
into effect
without op-
position at
the time.

The defendant, Basi Thakurain, maintained that this statement was utterly false. Had the plaintiff been the son of her deceased husband, she remarked, there would have been no occasion to talk of conveyances either from the latter or from herself. These papers were, in fact, of the plaintiff's own fabrication; he being an *élvé*, or *mamluk*, of the deceased, and as such still kindly received by the family; this circumstance, and her secluded situation, afforded him facilities for their production, but they could surely be of no effect. The public demand had not been discharged by the plaintiff as he had stated, but by the defendant herself from the ready cash left by the deceased, which was upwards of 700 gold mohurs, aided by the mortgage of a religious edifice (*Shivalaya*) of her husband, the site of which was now occupied by the chief civil authority in Benares. Such a payment was altogether beyond the plaintiff's private means. He had indeed obtained a grant by the connivance of the Resident's officers; but Mr. Fowke, at her suit, and on Ram Jeawun's own acknowledgment that she was the rightful heir, had directed a decree to be passed to give her possession. That the plaintiff's pleas under this head were unfounded would sufficiently appear from the records of the Court, which would shew that the lands were still in the hands of the mortgagee.

The other two defendants represented that the mortgage tenure had devolved on them from their father, who had acquired it with the sanction of the chief existing authority; and that the widow having received advances on subsequent occasions, the present balance against her was 19,000 rupees.

The plaintiff pleaded in rejoinder, that the late Baij Nath Singh had not merely brought him up, but had adopted him when a child as his son, with all the customary forms; of which the deed of gift was, he urged, a satisfactory evidence.

The First Judge of the Provincial Court having ascertained from the decree of Ali Ibrahim Khan, bearing date the 27th of November 1793, A. D., that Ram Jeawun on failing to establish his affiliation by the deceased, in conformity with the Hindoo law, had admitted the widow's right to the estate, instead of producing the deed of gift, on which the present claim was supported, as he undoubtedly would have done, if such document had then been in existence; and finding that the paper said to have been executed by Basi Thakurain, of which a copy only was now filed, had never been mentioned in bar of Futtih Chand and Company's tenure, originating in an order passed by the Acting Resident, under date the 26th of October 1793, and confirmed by a mortgage from the widow herself for 12,000 rupees, dated the 24th of June 1812; which circumstance plainly shewed that the plaintiff never held possession under that document; gave judgment on the 26th of July 1820, dismissing the claim with costs, and confirming the mortgagee in possession of the lands.

Both the plaintiff and the principal defendant had demised before this decree was passed, and the widow of the former had given in a deed of compromise, stated to have been made up by her husband and Basi Thakurain, but the deed was liable to suspicion from its not bearing the signature of the managing

agents of the latter, and even if authenticated, would not, it was held, have been of any validity without the consent of the mortgagee, and of one Sheo Ratna Singh, to whom the defendant in question had conveyed the estate, by a deed of gift, of a date (1855, S. S.) considerably anterior to that of the alleged compromise. That person was accordingly declared entitled to the land on satisfaction of the existing mortgage.

1823.

Chundun
Koonwaree
v. Sheo
Ratna
Singh and
others.

An appeal to this Court, under the new rules of 1814, was preferred by Chundun Koonwaree, the plaintiff's widow.

The Second Judge, in recording his decision, observed, that the statement of Raja Udit Narayan, combined with circumstances which had come out on the old trial, and the plaintiff's ignorance of his real parentage, afforded strong ground for presuming that he was the identical child who was shewn to have been found wandering about without any protector; and whatever might have been Baij Nath's reasons for bringing him up, it was not to be supposed that he would adopt as his son, a foundling boy, of unknown caste, like this.

True, it appeared from the record, that Ibrahim Khan (probably out of respect for the Resident's letter, which appeared sufficient to establish that point) had not called upon Ram Jeawun's agent to bear testimony to his client's admission of the widow's right, but there was no cause to believe that the latter would have hesitated to do so if called upon, as the pundits had already interpreted the Hindoo law against his employer; and the document had subsequently been carried into the fullest effect. That the widow should after this have surrendered the property was altogether incredible; and was contradicted by the result of Ram Jeawun's dispute with the mortgagees, the award of two tribunals proclaiming his aggressive trespass, and their established tenure.

The deed of compromise, Mr. Smith considered to have been got up clandestinely by the officers of the Raja of Benares, and of Sheo Narayan Singh, and approving of the reasons given for its rejection by the Provincial Court, he passed a final order confirming the decree of that authority, and dismissing the appeal with costs.

1823.

CHEYN SINGH, Appellant,

versus

Dec. 29th.

BURKUT OONISA and NOOROO, HUSUN KHAN,

Respondents.

The original proprietor of lands, granted by the ruling power on a tenure (*Aymah*) free of assessment, having, together with his successors, for a series of years, received a fixed sum from the grantor in lieu of his proprietary rights, the person to whom those rights may be subsequently transferred, has no claim to *malikana* at the rate of ten per cent.

THIS was an action instituted by the appellant, on the 27th of April 1814, in the Patna Provincial Court, to recover the sum of 13,767 rupees as *malikana* of Sambulpoor, and ten other mouzas in pergunna Patna, which had been granted as an *aymah* to Ali Azim Khan. The plaintiff stated that he was the rightful proprietor; that his dues from the year 1192 to 1220, F. S., for all the villages, which by reason of their not being subject to assessment were managed as one estate, calculated at the established rate of ten per cent on the actual produce, and including certain items of interest, amounted to 22,912 rupees; of which there had been received from the original grantee 4,745 rupees, and from that person's widow and grandson, the present defendants, 4,400 rupees, giving a total of 9,145 rupees, which left the balance now sued for.

It was pleaded by the defendants, in answer, that during upwards of a century which had elapsed since the *aymah* was acquired, no claim had been made for *malikana* at the rate of ten per cent; that the extent of such rights over lands exempted from assessment in that part of the country was not fixed either by general usage or by the regulations of Government, but on the contrary, was determined by agreement between the parties; that the plaintiff's claim was not by hereditary descent, a point which he had glossed over in the plaint, but rested (as stated by him to the deceased Nawab Ali Azim Khan), on a deed of gift from the heirs of Sukhanund Chowdhry, which deed could convey no further rights than were enjoyed by those persons; and that the Chowdhry's predecessors finding the lands, from the frequent encroachment of the Ganges, by which they were intersected, to have become unequal to the assessment, had entered into an engagement with the Nawab's grandfather, Abool Qasim, fixing their proprietary rights at the permanent annual sum of 400 rupees; which amount, as would be shewn by the receipts of themselves and all their successors, including the present plaintiff, had continued to be the rate of payment from that time.

The claim was dismissed with costs by the Second Judge of the Provincial Court, on the 31st of May 1816, on the ground that the plaintiff could adduce no satisfactory proof of the proprietary dues having ever been paid at the rate of ten per cent. The justice of the defendants plea, on the other hand, being established by the production of the receipts, and more particularly by the recorded accounts of the estate of Sukhanund's widow, which had been under attachment for the years 1190 and 1191: in which accounts the sum of 400 rupees was placed to credit on account of the proprietary dues in question for each year, the Court held it unnecessary to examine the witnesses of either party.

An appeal from the above judgment was brought before the Chief and Fourth Judges of the Sudder Dewanny Adawlut, (Messrs. Fendall and Goad), on the 27th of April 1820; when

the Court were of opinion, not only that the witnesses in this case should be heard, but that both parties should be allowed and required to file every document on which their respective rights were grounded. The Provincial Court was accordingly directed to carry this resolution into effect.

The Second Judge (C. Smith), after attentively considering, on the 29th of November and 1st of December 1823, the proceedings of the lower Court under the foregoing orders, recorded his opinion on the following day, agreeing with the Patna Court as to the sufficiency of the proof of the proprietary dues having been fixed at 400 rupees *per annum*, observing that this conclusion was corroborated by the consideration that the plaintiff, who came to the property in 1192, F. S., according to his own account, had received somewhat less than the above rate; but if he had been entitled to ten *per cent*, he would undoubtedly have required a regular account of the produce; while, if the property had been of such large amount, that the former owners should have alienated it, as it appeared they had done, in liquidation of expences incurred in a single action, was as improbable, as it was that the plaintiff, a professional pleader, should have quietly borne the loss for a period of nine and twenty years. Of the document on which the present suit was founded, a deed of conveyance executed by the heirs of the original proprietors in 1192, F. S., Mr. Smith observed, that, if of more recent date, its admissibility would have been very questionable; but, as at the time of its execution, near forty years back, there were no rules in force to regulate the amount of fees, and as during so long a period no objection had been made to it by the party whose interests were more immediately concerned, he thought that the transfer must be upheld as a valid one. The question was thus narrowed to that of the actual payments, estimated by the appellant at 9,145 rupees, and by the respondents at 11,375, which being deducted from 11,600, the sum justly due, would leave a balance of 225 rupees only; but it appearing that the latter had avoided giving any answer on this score until the case was referred back to the Provincial Court, and that for 2,400 rupees of the amount in question they could produce no other vouchers than their own accounts, Mr. Smith was led to conclude that the sum of 9,200 rupees, for which the respondents held the appellant's receipts, being within a trifle of the acknowledged payments, was all that had been received; and that the appellant was entitled to recover the sum of 2,400 rupees from Noorool Husun Khan, to whom it was in proof that the other respondent's share in the free tenure, had been transferred from the year 1213, F. S. He therefore recommended that the decree of the Provincial Court should be modified to this effect, and that costs should be divided between the parties in the same proportion.

The Fifth Judge (W. B. Martin) concurred in this judgment, for reasons very similar to those which had influenced the opinion of the Second Judge, noticing, in particular, the extreme improbability that the original proprietor should have alienated, on such an occasion, rights so valuable as those which the appellant now claimed. A final order was passed accordingly.

1823.

Cheya
Singh, v.
Burkut
Oonisa and
Noorool
Husun
Khan.

1823. BĀBOO RATNA CHANDRA, and MANIK KOONWUREE,

Appellants,

Dec. 29th.

versus

THE COLLECTOR OF ALLAHABAD, Respondent.

A *tehsildar* in Allahabad having caused certain lands lying within the limits of his authority to be purchased at a public sale in the name of his minor son, and the same being resumed by Government under the regulations of 1803, on satisfactory evidence that the lands were held by the father, a suit by the son for their recovery, supported by the allegation of their having been purchased from the funds of a female who had received him in adoption, dismissed by reason of the proved tenure of the father, and the absence of all previous mention of such adoption.

THE first appellant brought his action against Government in the Provincial Court of Benares on the 23rd of August 1815, to recover possession of the talook Aujana Bhaïron, comprizing Paharpoor, and sixteen other mouzas in pergunna Ekdilah, Zillah Allahabad, affording a yearly produce of 15,000 rupees. The plaintiff stated that he had acquired the lands by *bond fide* purchase through his agent at a Government sale on the 9th of December 1806, for the sum of 4,100 rupees, and had enjoyed them, subject of course to the public assessment, down to the year 1222, F. S.; as a proof of which, his father, who held employ in the Collector's office, having being called on for an arrear which had become due from the lands in 1216, F. S., had denied all concern in the management of them, which would appear from the public records: but that summary proceedings being afterwards instituted on his father's account against certain defaulting cultivators on two of the estates, and the sentence of dismissal passed by the native commissioner being appealed to the superior tribunal of the Sudder Aumeen, that person had reported to the Judge that the lands were liable to sequestration under section 14, regulation 25, and section 9, regulation 26, of 1803; and the Board, on the strength of an *ex parte* statement, furnished by the latter, had directed the resumption to be carried into effect.

The Collector pleaded in answer, that the fraudulent tenure of the lands in dispute by Govind Das, the pergunna *tehsildar*, and father of the plaintiff, was a matter of general notoriety, that person having publicly represented to the Collector, on the formation of the new settlement in 1220, F. S., that he had been induced to retain the mouzas at the old rate of 12,883 rupees, subsequent to the years 1216 and 1217, F. S., in consequence of the difficulty he had experienced in realizing the balance then due to him, and having further tendered a fresh engagement after the new rate of assessment was adjusted, in which he styled himself manager on behalf of his infant son, the present plaintiff; but it had been established before the Zillah Court on the 3d of May 1814, that the father had proceeded against the defaulting tenants on his own behalf, and as it appeared that at the period of the sale the son by reason of his tender years was incapable of authorizing another to act for him, the Judge had been satisfied that his name had been made use of by Govind Das to conceal his irregular conduct in purchasing lands subject to his official management; that the property had in consequence been sequestered by order of the Government; and the Board had eventually allowed the former proprietors to pay up their arrear, and re-enter upon possession.

A petition was given in by the second plaintiff, setting forth that she had affiliated Ratna Chunder, who by that ceremony was transferred from his father's family to that of his adopter, and

that the estates in dispute had been purchased from her funds for his benefit. 1823.

The Second Judge of the Provincial Court having ascertained that the defence was fully borne out by the records of the Collector's office, and of the Zillah Court; and holding that the circumstances detailed by Manik Koonwaree, if true, would have been brought forward when the sale took place, and that they would indeed have operated as a decided bar to the exercise of any authority over the lands by Govind Das, gave judgment on the 14th of December 1818, dismissing the claim with full costs. Baboo Ratna Chandra and Manik Koonwaree, v. The Collector of Allahabad.

The Second Judge of the Sudder Dewanny Adawlut (C. Smith) by whom, under an appeal preferred by both the plaintiffs, the foregoing judgment was taken into consideration, recorded his opinion on the 29th of December 1823, that the appellants had shewn no satisfactory reasons for the alleged adoption, which had never been heard of until it was thought convenient to assert it in a pleading filed more than ten years after the occurrence of the sale at which the lands were purchased by Govind Das; that in the interim numerous applications relating to the lands had come before the judicial and revenue authorities, in which the last named individual had frequently assumed the title of proprietor, and that his gross abuse of authority as a public servant was evident, for, in addition to the reasons already cited, his proceedings had been in violation of the rules established by section 9, regulation 26, 1803, and by section 14, regulation 25, 1803, in which it is provided, that "no Collector, Assistant or Dewan to a Collector, nor any relative in the employment of a Collector, or of an Assistant, shall hold, directly or indirectly, any farm, or be concerned on their private account, in the collection or payment of the revenue of any lands in the zillah, either as farmer, surety, or otherwise; and native officers and private servants and dependants of Collectors and Assistants, are prohibited from purchasing, directly or indirectly, any land which the Collector shall dispose of at public sale, under the penalty of forfeiting the property to Government, upon proof being made to the satisfaction of the Governor General in Council, of the property having been so purchased;" and that "all purchases of land at the public sales shall be in the names of the persons actually purchasing the same; without any fictitious substitution, or the substitution of the name of any other person whatever; any evasion of this rule will render the lands purchased in opposition to it liable to confiscation to Government, or to such other penalty as the Governor General in Council, on consideration of the circumstances of the case, may think proper to impose; but it is not intended to prevent any person, duly authorized, from making a purchase of land at the public sales for another: so that the real purchaser be declared at the time of sale, and his name registered accordingly;" and lastly, that if judgment had gone against Government, as the sale happened in 1214, F. S., the original proprietors, or their representative (a), might still have had their remedy by suit

(a) It being understood that their interests had been recently transferred by sale to one Zeyn-ool Abideen Khan, son of Dhomau Khan.

before the special commissioners at Allahabad, acting under the provisions of regulation 1, 1821. The appeal was accordingly dismissed with costs, Govind Das being left at liberty to petition Government to refund the amount which he had paid for the lands at the public sale.

1823.

LADLEE MOHUN THAKOOR, Appellant,

versus

Dec. 15th.

ISWAR CHUNDER PAL, Respondent.

In a dispute respecting the boundary of two estates situated in different zillahs, held that the summary award of one Court is insufficient to render the contested lands exclusively subject to its jurisdiction, and invalidate, under section 8, regulation 3, 1793, a regular suit which the party cast may institute in the Court of the Zillah within which he maintains them to be situated.

BY a summary decree of the Jessore Court, passed at the suit of the appellant's lessee, possession of eight hundred and fifty beegas of land, affording a yearly return of 1,250 rupees, and containing timber estimated at 160 rupees, was adjudged to be held by that person along with Bholanathpoor, and other mouzas of pergunna Bazeedpoor in that zillah, rented by him from Ladlee Mohun and his brother.

Kishen Chunder Pal, the respondent's father, who was principal defendant in that case, instituted, on the 23d of November 1808, the usual action to establish his right of property in the above lands, which he estimated at 2,500 beegas, as forming part of the Chaklah Dhuliyapoor, purchased by him from the original proprietor, Raja Giris Chunder Rai in the year 1213, B. S. The petition of plaint was filed in Zillah Nuddea, the Chaklah abovementioned being within the jurisdiction of that Court.

It was contended, in answer, by the defendants, that this proceeding was irregular, inasmuch as by the concluding part of section 3, regulation 49, 1793, the claim was cognizable only by the Court in which the summary decision had been passed; that the lands had in fact been long since detached from Dhuliyapoor, and annexed to certain dependencies of pergunna Bazeedpoor, purchased by them at public sale in 1203, B. S., and that both the old proprietor of that estate, and the defendants, had regularly received the rents until their father was dispossessed by the plaintiff, as was evidenced by the summary order.

A petition was given in by the proprietors of the neighbouring talooks of Surfurazpoor and Noornugger, asserting that they were the rightful holders of part of the lands which the plaintiff claimed; and that the latter had entered a separate action against them for certain lands in which the above were included.

The plaintiff having died, this petition was answered by his sons and executors, Prem Chunder and Iswar Chunder, who maintained that the lands in question were in possession of the defendants in this suit, and had been inserted by mistake in that which their father had instituted against the petitioners.

The Zillah Judge, after the fullest local enquiry, conducted in the first instance by an officer deputed by him for that purpose, and subsequently by himself in person, being drawn to a conviction from the evidence that the summary order had been obtained by collusive documents and suborned testimony, and that the lands claimed were actually within the limits of the plaintiff's estate,

passed a decree in favour of the claim to the extent of 1,552 beegas, with corresponding costs: The remainder of the land designated in the plaint, which was found to consist of 1,138 beegas, was left in the hands of the petitioners, who held the same under a summary order, and were not defendants in the present suit. The defendants were further declared liable for the profits of the quantity of land ascertained to have been under cultivation, or 488 beegas, from the year 1215 to 1218 B. S., inclusive, amounting with interest to 2,147 rupees.

1823.
Ladlee Mohun Thakoor, v. Iswar Chunder Pal.

An appeal on behalf of the two principal defendants having been dismissed with costs by Mr. J. M. Rees, Acting Judge of the Calcutta Provincial Court, on the 29th of April 1818, Ladlee Mohun preferred an application to the Sudder Dewanny Adawlut to admit a special appeal, which was allowed by order of the Third Judge (W. E. Rees) on the 27th of April 1819; that gentleman observing that so long as the summary order stood unaltered, the lands must be taken as constituting part of Jessore, and consequently that this cause, under the general rule laid down in section 8, regulation 3, 1793, was properly cognizable in that zillah only, and was open to a special appeal under the restricted rules of admission contained in the first clause of section 2, regulation 26, 1814.

The appeal first came on before the Third and Officiating Judges (Messrs. Goad and Dorin), on the 12th of February 1821; and the former holding it to be fully established by the proceedings of the lower Courts, that the land in question was situated within the jurisdiction of zillah Nuddea, expressed his opinion that the case should be struck off the file without further enquiry.

The decision of the cause having been delayed in consequence of Mr. Dorin's absence, was ultimately on the 15th of December 1823, taken up by Messrs. Harington and Leycester, who having ascertained that pergunna Dhuliyapoor was situated in zillah Nuddea, and finding no other ground of objection to the very minute investigation of the Judge of that district, passed a final order confirming his judgment and dismissing the appeal with costs. (a)

(a) It may be observed that the defendant's original plea is not fully borne out by the wording of the rule cited by him. Section 3, regulation 49, directs a summary award against the offender or party trespassing, leaving him to prefer his claims to the property in dispute to the Dewanny Adawlut.

1823.

BHOWANEE SINGH and RAMNIDH SINGH, Appellants,

versus

March 19th.

PRANPUT SINGH, and RUNJEET SINGH, Respondents

In the case of a sale of one *puttee* or share of an estate for arrears of revenue, the loss falls upon the whole of the *putteedars* or share holders equally, and not on any particular individual on whose portion (parcelled off by private agreement) the arrears accrued; no formal division of the property having been made in the manner prescribed by the regulations.

THIS was a suit instituted by the respondents in the Juanpore Zillah Court on the 14th of June 1823, against Doorga Singh, since dead, and Bhowanee Singh, one of the present appellants, to have divided off and obtain possession of a half of certain portions of Busra and other unsold mouzas, to the extent of 2,615 beegas, 10 biswas of land, which constituted the *puttee* or share of Bishumber Rai, in talook Madhoo Rai, situated in tuppá Muthwar, pergunna Khureed. Suit laid at 1,101 rupees.

The plaintiff set forth, that the *puttee* of Bishumber Rai, which consisted of seventy-two villages subject to a *jumma* of 3,788 rupees, 4 anas, became the property equally of the defendants and of Sheo Dehul Singh, the plaintiff's father, by purchase from Duswunt Singh, the person who bought it at public auction: that the above persons obtained an *umuldustuk*, or order for possession, from the Collector in their own names, and paid the revenue due to Government without dividing the land or the *jumma*; that Baboo Deokinundun Singh, the *tehsildar*, colluded with the defendant in reporting to the Collector of Benares an arrear of 1,600 rupees as due from the father of the plaintiffs (but for which in fact all the three cosharers were responsible), and the Collector, without ascertaining the truth of the statement, ordered the plaintiffs father's moiety of Bishumber Rai's *puttee* to be publicly sold, and the defendants obtained possession of it on producing bills of purchase, when the plaintiffs father presented a petition to the Collector, in consequence of the sale being illegal and the defendants purchase therefore invalid, as well as another to the Court for permission to sue the Collector, which was forwarded to Government, who directed the Collector to reply to it; that the plaintiffs father was dead, and the Collector not having submitted his reply, no orders had yet been passed by Government, which explained the delay on the part of the plaintiffs in suing for the recovery of the villages which had been publicly sold; but that they would do so as soon as the orders were issued. The plaintiff proceeded to state, that the Collector had taken no notice of the defendants having dismissed the Aumeen deputed by himself, without dividing and relinquishing possession of the unsold villages, and the defendants continued to appropriate and expend the whole proceeds of the above villages, and refused to let the plaintiff participate, although they paid their moiety of the revenue. The plaintiffs now sued, on the ground that the estate in dispute was a joint and undivided property.

The defendants in reply described the above *puttee* to consist of eleven villages and a half, being part of a share in forty-two villages, and stated that they and Sheo Dehul Singh, the purchasers of the *puttee*, made a division according to family custom, paid equal shares of revenue to Government, and received separate vouchers. That when in the year 1210 *Fuslee*, Sheo Dehul Singh became in arrears to Government, they (the defendants) bought at public

auction four villages, yielding a *jumma* of 1,617 rupees, of his moiety, which consisted of five mouzas, and obtained possession. That the remaining village yielding a *jumma* of 276 rupees, 15 anas, 9 pie, continued in the possession of Sheo Dehul Singh, and was not sold. That a few years afterwards Sheo Dehul Singh became in arrears for the revenue of that portion likewise, and the Collector imprisoned them (the defendants) with him, on the ground that the settlement had been a joint one: that they paid into the treasury of the Court 94 rupees, 7 anas, in consequence of an order from the Collector, dated December the 16th 1808, to their address, declaring, that if they discharged the arrears due to Government from the portion of Sheo Dehul Singh, and preferred a petition, they should obtain an *umuldustuk* with the sanction of the Government; that in conformity to section 17, regulation 6, of 1795, they paid 513 rupees, 5 anas, 9 pie, the arrears of Sheo Dehul Singh for 1215, as well as the arrears for 1214 *Fuslee*, altogether 607 rupees, 12 anas, principal, interest, fees, &c. into the *tehsildar's* office, obtained possession of the above portion, had continued to pay the revenue since 1216 *Fuslee*, and in consequence of the order passed by the Board of Commissioners on the 1st of October 1811, expected soon to get *sunnuds* for possession and regular title deeds. They therefore maintained, that as they had paid the arrears of Sheo Dehul Singh in obedience to the order of the Collector, his right and title had ceased, and the title of the plaintiffs father being extinct, their claim as his heirs was necessarily null and void.

1828.

Bhowanee
Singh and
Ramnidh
Singh, v.
Pranpat
Singh and
Runjeet
Singh.

The cause was transferred from the Juanpore Zillah Court for decision to the additional Register at Ghazepoor, who on the 25th of September 1817, passed a decree to the following effect: "Although it would at first sight appear from the circumstance of the *pottak* being granted in the name of the three cosharers jointly, as well as from no regular division having taken place, that the estate now in dispute was a joint and undivided property, yet after perusing the different documents exhibited by the parties in this case, as well as the papers furnished from the Collector's office, and the depositions of the witnesses on both sides, I am of opinion that the plaintiffs claim must be disallowed for several reasons.

First, because, from the *mokhtarnama* in the name of Sheo Dehul Sing, dated July 19th 1801, as well as from the statement of that person dated the 10th of March 1808, written in the hand-writing of Doorga Singh, at the end of the *kabooleyut*, and purporting to be signed by Doorga Singh, for and on behalf of Sheo Dehul Singh, it appears that when the plaintiffs father (Sheo Dehul Singh) and the defendants bought the estate in question from Duswunt Singh, the purchaser at public auction, Sheo Dehul Singh was appointed *mokhtar* by the defendants, for the purpose of signing the *kabooleyut* to be presented to Government by them as the proprietors of talook Mungut Rai, and accordingly the *kabooleyut* is signed by Sheo Dehul Singh on behalf of himself and his constituents: and, moreover, at the end of that instrument there is a specification and allotment of the *jumma* payable to the Government by each of the cosharers respectively. Sheo Dehul Singh could not therefore have been averse to such a division.

1823.

Bhowanee
Singh and
Ramnidh
Singh, v.
Pranput
Singh and
Ranjeet
Singh.

Secondly, because, although by section 7, regulation 27, of 1795, no transfers or divisions of *jumma* made by the proprietors of a *zemindaree* without the knowledge and concurrence of the Collector, will exempt such estate from being sold in satisfaction of any arrears that may fall due to Government, yet they are valid and will hold good between the parties themselves, except in cases of fraud, which invalidates all engagements. No such objection applies in the present instance.

Thirdly, because it appears from the depositions of the *Putwarees*, as well as from the papers exhibited by the defendants, that each sharer separately collected the rents of his portion and paid the revenue to Government. Neither can any joint accounts be found.

Fourthly, because the *Puttees*, Mungut Rai and Bughee Rai, which were so called after their owners, were separate and distinct estates, and neither could sustain an injury from the sale or mortgage of the other, so that no loss could have been occasioned by the public sale.

Fifth, because it appears from a decree of the Court of Appeal, dated 6th of September 1817, on the subject of annulling the public sale of Tuppah Manipur Rai, that the Third Judge recorded his opinion that when a *Putteedar* separately pays the revenue of his portion, the Collector ought to receive and register it as the *jumma* paid by the proprietor of such *puttee*, and thence it may be inferred, that if a *Putteedar* becomes in arrears, his *puttee* ought to be sold separately.

Sixthly, because the public sale of the fractional part of an estate is alone forbidden by section 2, regulation 1, of 1801, and this does not apply to the sale of a distinct and separate *puttee*.

Seventhly, because there appeared among the papers sent by the Collector a deed specifying the division of the *jumma*, signed by all the three sharers, and witnessed by the *Serishtadars* and the seal of the pergunna *Kazee*. But although there was no reason to doubt the authenticity of it, yet as no witnesses had been called to confirm it, and as there were other sufficient grounds for his allowing the claim, he dismissed the suit with costs, without taking the above document into consideration.

The plaintiffs appealed as paupers to the Benares Provincial Court, and Ramnidh Singh, son of Ram Chein Singh brother to Doorga Singh, deceased, and Bhowanee Singh, appeared to answer the appeal as respondents.

On the 27th of June 1820, the First and Second Judge of that Court recorded their opinion as follows: that it appeared from copies of records in the Collector's office, that the talook Madhoo Rai consisted altogether of forty-two villages; that the parties enjoyed in some villages a fourth, and in others an eighth share; that no division had ever taken place; that the revenue had been collected jointly: that eighteen of the above forty-two villages were mentioned in the *umuldustuk* of the Collector, dated 29th of May 1804, and the *pottah*, in the name of the respondents, dated 4th of January 1804, as having been publicly sold in satisfaction of arrears of revenue to Government, and purchased by the respondents: and therefore as it was an undivided estate, the parties had an equal claim and title to such villages as remained

unsold. That no credit could be attached to the respondents' statement, that they had bought at public sale a part of the appellants' share, and had obtained possession of the remaining village in consequence of the Collector's order on paying the arrears due from the appellants; because the *tehsildar's* report, which was written at the instigation of the respondents, was the only document which declared the appellants to be the sole defaulters, and was not corroborated by the other papers: and that as no document could be found in the Collector's or *tehsildar's* office which mentioned a division having ever taken place, the property must be considered as joint and undivided. They therefore reversed the decision of the Ghazee-pore Zillah Court, and passed a decree in favour of the appellants, awarding them possession of half the unsold villages jointly with the other co-sharers, and making all costs payable by the respondents.

1823.

Bhowanee Singh and Ragnidh Singh, v. Pranput Singh and Runjeet Singh.

A petition for a special appeal was preferred to this Court, which was allowed by Messrs. Smith and Goad, on the 9th and 11th of November 1820, on the authority of former decrees, because the argument and proof adduced in the decree of the Ghazee-pore Zillah Court had not been satisfactorily controverted in the decree of the Benares Provincial Court, because there was a doubt whether the respondents were formerly in possession of *puttee* Mungut Rai.

The case came to a hearing before Mr. C. Smith, who summed up the evidence to the following effect:

It appears that the present suit was instituted by the respondents to recover a share of such of the lands mentioned as the *puttee* of Bishumber Rai as remain unsold; the *jumma* of the whole *puttee* was 3,788 rupees; certain lands, the *jumma* of which amounted to 1,870 rupees, were publicly sold in satisfaction of arrears of revenue to the Government, and were purchased by the defendants. The *jumma* of the unsold lands amounts to 2,171 rupees, a moiety of which is now claimed by the plaintiffs, on the grounds that the whole of Bishumber Rai's *puttee* was the joint and undivided property of Bhowanee Singh, Doorga Singh, and of Sheo Dehul Singh, the father of the present respondents; Sheo Dehul Singh being entitled to one-half, and the two other sharers each to one-fourth of the estate; that no division of the estate ever took place in the manner prescribed by the regulations; that the arrears did not originate solely with Sheo Dehul Singh, and therefore that all loss occasioned by the public sale must be sustained equally by the partners. The defendants, who are the present appellants, alleged in reply, that the arrears were solely attributable to Sheo Dehul Singh, that the *puttee* of Bishumber Rai was a separate and divided property, and therefore that all injury sustained by the sale must be borne by Sheo Dehul Singh alone. It appears from the papers of the case, that in 1208 *Fuslee*, a pottah was granted for the *puttee* of Bishumber Rai jointly in the names of the three sharers; and in the same way a joint *kabooleyut* was executed which specified the *jumma* payable by each of the three sharers: the land, however, was not divided. An *umuldustuk* also dated November 29th, 1801, appears to be one for the whole of the joint and undivided

1823. property of all the three partners. No division of the *puttee* seems to have taken place in conformity to regulation 26, of 1795, and the 9th regulation of 1811. For that reason, and as the Government pottah was granted in the names of the three partners, they were all equally responsible for the arrears under section 25, regulation 2, of 1795, and sections 7 and 10, regulation 27, of 1795. Although the *mokhtarnama* executed by the other two sharers in favour of Sheo Dehul Singh at the time when the pottah was granted, is not quite unobjectionable, yet it sufficiently appears that Sheo Dehul was vested with full power as *Mokhtar* by the others, and as he acted in that capacity in signing the *kabooleyut*, and no exception was taken by them to his acts, they are valid and cannot be called in question. The subsequent purchase of the remainder of Sheo Dehul Singh's shares by the defendants cannot be upheld as allowable under section 17, regulation 6, of 1793, inasmuch as the other two sharers were responsible equally with Sheo Dehul Singh. The title to the above lands claimed by the appellants under section 14, regulation 9, of 1811, cannot be admitted, because the provisions of that regulation apply only to lands which have been legally and regularly divided. He therefore recorded his opinion that what remained of Bishumber Rai's *puttee* was a joint property; that the loss sustained by the public sale should be borne jointly; for although the arrears might have been caused only by one of the sharers, and an arrangement by way of division might have been made between the parties, yet as all three were associated in the pottah, and no division had ever taken place conformably to the regulations, the property sold cannot be considered as belonging only to one of the sharers; that whatever money was paid by the two sharers on account of the arrears of 1215 *Fuslee*, must be considered as having been paid for the common benefit; and the sum paid by the others, on behalf of Sheo Dehul Singh was claimable and recoverable from him. He therefore affirmed the decision of the Provincial Court, and dismissed the appeal with costs, and awarded to the respondents possession of the lands in dispute, with mesne profits from the date of the Zillah Court's decree (a).

(a) This case was inadvertently omitted in its proper place.

MUSSUMMAUT JYMUNEE DIBIAH, Appellant,

1824.

versus

RAMJOY CHOWDREE, Respondent.

Jan. 6th.

THIS was a suit instituted by the appellant, in the Burdwan Zillah Court, on the 2d of December 1811, against Deokinundun Chowdree, and his sons Ramjoy Chowdree and Nubkoonar Chowdree, to recover possession, in her husband's right, of a four ana share of mouza Kurna Dhora, and a two and half ana portion of mouza Pungaon, &c. Suit laid at 531 rupees annual produce, and 264 rupees mesne profits, total 795 rupees.

It appeared from the plaint, that an eight ana portion of mouza Kurna Dhora was the hereditary talook of Hurree Churun Chowdree, the plaintiff's father-in-law, and on his death was enjoyed in coparcenary by his four sons, Ram Kanth Chowdree (the plaintiff's husband), Deokinundun, Dhurneedhur, and Caleepershaud, who all lived together as a joint and undivided family. Dhurneedhur died in 1181, B. S. leaving his widow Soordhonee without issue. The three surviving brothers, subsequently, while living together, purchased a five ana share of mouza Pungaon, &c. out of the profits derived from their ancestral estate. Caleepershaud died childless in 1201, B. S., leaving his widow Mussummaut Sukhee Dibiah, still living. The two remaining brothers, namely, the plaintiff's husband and Deokinundun, after living together for a long time on friendly terms, quarrelled and separated in the year 1215, B. S., and referred their dispute about their respective shares of the lauded property to the arbitration of Monlovee Nisar Ali, Moonshee Dewan Man Govind, and Meer Kheirat Ali, who divided the property equally between them, merely awarding, as maintenance to the widows of the deceased brothers, the profits during their lives of their respective husbands' shares (which, on their death, were to revert equally to the surviving brothers), payable by the surviving ones; that of Sukhee Dibiah by Deokinundun, and that of Soordhonee Dibiah by Ram Kanth the plaintiff's husband. The plaintiff's husband died in Assin 1216, B. S., leaving two sons minors, by name Ram Komar Chowdree and Raj Komar Chowdree; when the defendants forcibly took possession of the lands in dispute, which by the award of the arbitrators belonged to the plaintiff in her husband's right, and allowed her maintenance only. She therefore now sued for the recovery of her husband's share, which the defendants refused to restore.

The defendant, Deokinundun Chowdree, stated in answer, that his father Hurree Churun Chowdree sold a four ana portion of the above ancestral estate to Gooroopershaud Mujmooadar, and that he (the defendant) had purchased it with his own money from the heirs of that person; that a three ana share of mouza Pungaon was bought at public auction by his younger brother Caleepershaud solely on his own account; that on his death his widow had succeeded to the possession of it, and that therefore the plaintiff's suit for the recovery of it was inadmissible against him (the defendant); that a two ana share of mouza Pungaon,

1824. &c. was purchased and engaged for by himself, exclusively, and that the plaintiff's statement, that it had been bought with the profits derived from the ancestral estate was altogether false, for if such had been the case, it would have been entered, in the names of all the partners, in the Collector's office; whereas, it was registered in his (the defendant's) name alone; that, although the defendant and the plaintiff's husband consented to the arbitration of Moulouee Nisar Ali and the others, yet, as he (the defendant) was absent through illness, and the depositions of his witnesses had not been taken in his presence, he was ignorant of the grounds of their award. The other defendants did not appear to plead.

Mussum-
maut Jy-
munee Di-
biah, v.
Ramjoy
Chowdree.

On the 22d of February 1815, the Zillah Judge passed a decree in favour of the plaintiff, awarding her possession of the share sued for, on the ground of the decision of the arbitrators, and making the defendant pay costs.

Deokinundun appealed to the Calcutta Provincial Court from the above decree, affirming that one fourth of the lands belonged to Soordhonnee Dibiah since deceased, whose heir he (the appellant) was. Dying shortly after the admission of the appeal he was succeeded by his son Ramjoy Chowdree.

On the 23rd of June, 1819, the Senior and Officiating Judges of the Court of Appeal passed a decree amending the judgment of the Zillah Court, and awarding to Mussummaut Jymunee, as guardian to her minor sons, possession of her husband's share, and to Ramjoy Chowdree possession, as heir to Soordhonnee Dibiah, (deceased widow of Dhurneedhur) of her husband's share, and making the respondent pay all the costs in that Court, on the ground of the opinion of the pundits, that "if Mussummaut Soordhonnee (widow of Dhurneedhur) died during the life time of Deokinundun, her late husband's brother, he, and after his death, his sons, would succeed to the fourth share, which belonged to the said Dhurneedhur." The decision went on, further, to state, incidentally, that it would appear from the pundit's opinion, that on the death of Sukhee Dibia, the widow of Caleepershaud, whenever that event might happen, his nephews would be entitled to the property which had belonged to him.

The present appellant preferred a petition for a special appeal to this Court, which was allowed, and the case came to a hearing before the Third Judge (J. Shakespear) on the 11th of August 1823, who was of opinion that the decree of the Provincial Court ought to be reversed, and the judgment of the Zillah Court, founded on the award of the arbitrators, affirmed. The case was accordingly referred to the Second Judge (C. Smith), who observed that the statement made by Deokinundun, as to his having purchased a part of the lands in dispute with his own money, was false, and had been disproved before the arbitrators appointed with the consent of the brothers; the whole of the lands in dispute having been then shewn to be ancestral property; but that the award made by those arbitrators during the life time of the appellant's husband and Mussummaut Soordhonnee, widow of Dhurneedhur (the brother of the appellant's husband) could not have effect prospectively, or be applicable to the circumstances of the case after their deaths, which happened before the date of this

suit. He was therefore of opinion that the decisions of both the lower Courts were incorrect, and ought to be amended, and that the fourth share, belonging to the appellant's husband, and a moiety of Dhurneedhur's fourth, which had been made over to the care of the appellant's husband for the support of his (Dhurneedhur's) widow, ought to be awarded to the appellant, who, after the death of Caleeper-haud's widow, should also succeed to a moiety of his fourth which had been made over to Deokinundun for her support, the other half of the fourth share of each of the deceased brothers devolving on the respondent.

1824.

Mussum-
maut Jy.
munee Di-
biak, v.
Ramjoy
Chowdree.

The case was next brought before the Chief Judge (W. Leycester) and the Officiating Judge (J. H. Harington). They deemed it necessary to consult the pundits on the law of inheritance applicable to the case, and the following was the substance of their opinion delivered in reply to the questions of the Court: "If Mussummaut Soordhonnee, widow of Dhurneedhur, died during the life time of his brother Deokinundun, and of the widow and sons of Ramkanth Chowdree, another of his brothers, Deokinundun is exclusively entitled to the share of Dhurneedhur; inasmuch as a brother, according to the Hindoo law, succeeds before his nephews. If, in consequence of the award made by arbitration, Ramkanth Chowdree obtained possession of his own and of Dhurneedhur's share, and gave maintenance to Mussummaut Soordhonnee out of the profits of it, still he cannot legally succeed to the share during the life time of Soordhonnee, inasmuch as a widow is entitled to the property of her deceased husband; and if Mussummaut Soordhonnee died subsequently to the death of Ramkanth, Deokinundun is entitled to succeed to her husband's property, being his proper heir, to the exclusion of his nephews (Ramkanth's sons). This is the Hindoo law as laid down by the authorities prevalent in Bengal. The text of *Yajnyawalkya*, cited in the *Daya Bhaga*, "a wife, daughters, both parents, brothers, their sons, and on failure of the first of these, the next in order, shares the estate of him, &c." The text of *Vishnoo*, cited in the same authority, "the wealth of him who leaves no male issue goes to his wife; on failure of her to his daughter, if she be dead, to the son of a daughter; if there be no such, grandson to the father; in his default to the mother; on failure of her to the brother; if he be dead to the brother's sons, &c." The pundits had previously stated, in reply to a question propounded to them by Mr. Shakespear, that on the death of a widow, on whom property had devolved at the death of her husband, the widow of another brother was not under any circumstances recognized as an heir by the Hindoo law.

The Court seeing no reason to alter the decree of the Provincial Court, it was, on the 6th of January 1824, finally affirmed, and the appeal dismissed with costs.

1824.

MOOHUMMUD YAR KHAN, Appellant,

versus

Jan. 6th.

MOOHUMMUD EESAU KHAN, Respondent.

The heir of a widow claims her dower from her late husband's estate under a deed executed by him before the Company's accession to the Dewanny; held that the claim is inadmissible, the truth of the demand not having been acknowledged within twelve years prior to the institution of the suit.

THE respondent brought this action on the 19th of February 1819, in the Patna Provincial Court, against the appellant and Mussummaut Zeenutooni-sa Begum, since deceased, to recover possession of Luchmee-poor and five other mouzas in pergunna Ghyaspoor, Zillah Behar. Suit laid at 36,018 rupees, eighteen times the computed annual produce, and 2,001 rupees mesne profits. Total 38,019 rupees.

The plaint set forth, that on the death of Nuwab Shakir Khan, (the plaintiff's paternal grandfather) the mouzas attached to the Simneah, an *altumgha mehal*, his property, were divided into five shares; to two of which Inteez Khan, the plaintiff's father, succeeded, two more were allotted to his other son Sirufraz Khan, the plaintiff's uncle, and the remaining portion to Mussummaut Shurufoonissa, *alias* Shukuroonissa Begum, his daughter, the plaintiff's aunt, who all obtained possession of their respective shares; that on the death of Mussummaut Shukuroonissa, which happened on the 25th of *Bhadoo*, 1224 *Fuslee*, all her estates and property (namely a fifth portion of the Mehal Simneah, and mouzas Khankhanaupoor, Buhrawan, and Sirkutee, together with certain dwelling houses belonging to her husband, Sher Afgan Khan, which he had transferred to her by deed of gift, and the sum of 125,000 rupees, which had been settled upon her as dower) descended equally to the above Sher Afgan and the plaintiff according to the law of inheritance (there being no other heir), who accordingly obtained possession of their shares; that on the 7th of *Mohurram* 1233, *Higeree*, Sher Afgan executed a deed in the usual form, transferring his moiety of his late wife's property to the plaintiff, and died on the 17th of that month; that, after the plaintiff, as heir, and under the deed executed by Sher Afgan Khan, had obtained possession of all the lands, houses, and other property left by Mussummaut Shukuroonissa, the defendants, who are the brother and sister of Sher Afgan Khan, fraudulently disputed his (the plaintiff's) right, sued for possession of the above lands, and had obtained a summary decree from the Behar Zillah Court to be put in possession of them, for the recovery of which the plaintiff now sued, being already seized of the dwelling houses, furniture, and other property situated in the city of Patna, possession of which had been awarded to him by the Judge of that jurisdiction.

The defendants, in reply, stated that the deed of gift, dated in 1203. F. S. purporting to be from Sher Afgan to his wife, as well as that from the same individual to the plaintiff, were not genuine, and that they were moreover inadmissible under the 9th and 11th sections of regulation 1, 1814; that Shukuroonissa by an *ikhrarnamah*, executed on the 19th of *Zeekaudah*, 1194, *Higeree*, had made an unqualified transfer of Luchmee-poor and the other mouzas in dispute, to her husband Sher Afgan Khan, and by the execution of a deed, to the effect that she, subsequently

to her husband's will, dated 1226, *Higeree*, seven years back, (by which in case of her surviving him she would succeed to and enjoy all the above property during her life time, and which in case of her death would revert entirely, to him) relinquished in the plaintiff's presence her claim to dower; that, moreover, the plaintiff and his family had colluded with the wives and servants of Sher Afgan, and fraudulently obtained possession of the above written acknowledgment of his wife, his seal, papers, and other property. 1824.

Moohum-
mud Yar
Khan, v.
Moohum-
mud Eesat
Khan:

The plaintiff, in answer, stated that Shukuroonissa had never transferred her fifth share to her husband Sher Afgan: but that, he being her husband, in consequence of her living in a state of privacy, acted as manager and superintendant of the estate on her behalf; that Shukuroonissa, on hearing that he had asserted the existence of an unreserved deed of transfer to him from herself, fearing lest she should be deprived of her rights, was about to institute a suit, when Sher Afgan executed an unqualified deed of gift in her favour of all his own property, as well as of the fifth share of the landed estates, which he had represented as having been made over to him, and which she had inherited from her father: that, on one occasion, when the lands were about to be disposed of on account of an arrear alleged to be due by Sher Afgan, Shukuroonissa made a representation of the rights which were inherent in herself, and they were recognized by the Collector and Board of Revenue. That what the defendants had asserted respecting the will, as well as the relinquishment of claim to dower, was false and unfounded; inasmuch as Sher Afgan himself, after the death of his wife, and eleven days before his own, acknowledged that he was liable for the payment of his wife's dower, and that, had the defendants statement on this head been correct, Sher Afgan would certainly have taken back and cancelled the marriage settlement.

The defendants in rejoinder repeated their former assertions.

On the 17th of September 1819, the Acting Judge of the Patna Court observed, that the defendants did not deny that mouzas Luchmeepore, &c. were the property left by the father of Mussumaut Shukuroonissa, nor that Sher Afgan was liable to the payment of her dower; that their statement respecting the general deed of transfer from Shukuroonissa to her husband and his will was disproved by his having executed another deed transferring the whole of the above fifth share, as well as all his own estates, to his wife, and by his having written after her death, an *ikrarnamah*, acknowledging his former deed, and transferring to the plaintiff half of the property left by Shukuroonissa in lieu of half the dower; which facts were proved by the testimony of the witnesses and the petition presented to the Collector by Shukuroonissa. That the defendants statement, with regard to Shukuroonissa having remitted the payment of her dower was evidently false, as they had produced no documents to support their assertions; that even if they had, they would have been unable to set aside Sher Afgan Khan's own proved acknowledgment, and that the circumstances of Sher Afgan having been in possession (which the plaintiff does not deny), did not bar his

1824.

Moolum-
mud Yar
Khan, v.
Moolum-
mud Eesau
Khan.

lawful and undoubted claim, as heir. He therefore passed a decree awarding to the plaintiff possession of the lands in dispute, and 2,001 rupees mesne profits for the year 1226 F. S., and making all costs payable by the defendants.

The defendants appealed to this Court, and the case came to a hearing before the Third and Officiating Judges (Messrs. Goad and Dorin), on the 1st and 2nd of January 1822, who referred it back to the Court below for further evidence on certain points which seemed to require elucidation.

The case came to a hearing a second time on the 1st of December 1823, before the then Chief and Officiating Judges (W. Leycester and J. H. Harington), when it was judged expedient (as the respondent's claim was founded on his right as heir to succeed to the property of Mussummaut Shukuroonissa, and on the liability of Sher Afgan, or his estate, to discharge the dower specified in her marriage settlement after her death) to take the opinion of the law officers on that deed. The Moulovees of the Court, in reply to the questions put to them, stated that her dower might have been demanded by Shukuroonissa during her life time, and that unless she remitted it, or otherwise relinquished her claim, her heir could recover it on her death from her husband, and on his death from his estate; that as there were no other heirs, Sher Afgan Khan, and the respondent, were, on the death of Mussummaut Shukuroonissa, entitled to equal shares of her property, and that the case was not affected by the wills alleged to have been executed by Sher Afgan and Shukuroonissa. The case came to a final hearing on the 6th of January 1824, when the Court recorded their opinion that the *ikrarnamah* dated the 7th of *Mohurram* 1233, *Higeree*, executed by Sher Afgan a few days before his death in favour of the respondent, not having been written on the prescribed stamp paper, was inadmissible, under the 9th section of regulation 1, 1814: that the respondent was however entitled, as heir, to the possession of half of Mussummaut Shukuroonissa's hereditary property, and to a moiety of the mesne profits since her death, as it appeared that she had never transferred, according to the appellant's statement, the fifth share of her father's estate to her husband; but that his claim to the other half and to the mouzas of Khankhananpoor, &c. was inadmissible; being founded on an instrument not bearing the prescribed stamp as above noticed, and that his claim to dower, inasmuch as it was founded on the marriage settlement, dated the 19th of *Rubeeqosunee* 1176 (corresponding with A. D. 1763) previous to the Company's accession, was not cognizable under the 14th section of regulation 3, 1793, unless it could be proved (which it had not been) that Sher Afgan had admitted the truth of the demand for dower within twelve years previous to the date of the suit.

The Chief and Officiating Judges, therefore, passed a decree amending the judgment of the Provincial Court, and awarding to the respondent possession of a half share of mouza Luchmee-poor, &c. and a moiety of the mesne profits from the death of Mussummaut Shukuroonissa; but dismissing his claim with respect to the other half, as well as to mouzas Khankhananpoor, &c. the ancestral property of Sher Afgan, (of which they ordered the

appellant to be put in possession with mesne profits while enjoyed by the respondent) and making the costs of both Courts payable by the parties respectively (a).

FUQEER MOOHUMMUD, (Pauper), Appellant,
versus
 MUSSUMMAUT KANDEE, (Pauper), Respondent.

1824.

Jan. 15th.

THIS was a suit brought by the present respondent, *in form* *The heirs of a Moosul-*
pauperis, in the Zillah Court of the Suburbs of Calcutta, on the 21st of April 1815, against Mussummaut Mukna and the present *man being*
 appellant, for three beegas, fifteen biswas of land, with a house, his mother,
 tank, and garden lands in the villages of Huragh and Tiljila, and his brother,
 and certain goods and chattels described in a separate list (being the *and his wi-*
 property left by her husband) in satisfaction of her claim to 1,761 *dow, his*
 rupees, owing to her, first on account of her marriage settlement *property*
 (1,700 rupees,) and secondly, on account of the value of the *should be*
 paraphernalia received at her nuptials. *made into*
twelve

The plaintiff set forth that her husband Shakir, *Khansaman*, had *parts, of*
 settled on her on their marriage, the sum of 900 rupees, and 50 *which four*
 gold mohurs; that 40 years after their marriage he died, in *Asarh* *should go*
 1220, B. S.; that she then remained in possession of her husband's *to the mo-*
 property, moveable and immoveable, and retained the documents *ther, five*
 relating to her marriage settlement, until *Bysakh* 1221, B. S., when *to the bro-*
 the defendants, who are the mother and elder brother of her *ther, and*
 deceased husband, assaulted her, turned her out of the house, and *three to the*
 took forcible possession of all her husband's effects; that she *widow, and*
 brought a charge against them to obtain redress for this outrage *on the mo-*
 in the Foujdarry Court, the Magistrate of which Court told her to *ther's death*
 have recourse, for the recovery of her rights, to the civil jurisdic- *her shares*
 tion, which she had accordingly done. *go exclu-*
sively to
her surviv-
ing son.

The defendant, Mukna, replied that she knew nothing of the amount of the plaintiff's settlement, or of her husband's fortune, or what part of his property had been given to the plaintiff in lieu of her settlement in money. But the state of the case was this, that she (the defendant) had been supported by the produce of nine biswas in the Jan Bazar in Calcutta, which had been the property of her husband, one Lal, a *Khansaman*, and had devolved

(a) See the printed case of Ali Buksh Khan, appellant, *versus* Kaeem Beebee, decided on the 24th of August 1801, in which case judgment was given for the daughter of a deceased Moohummudan against the male relatives in possession of his estate, for a half share of the dower of her mother unpaid during the life of the mother whom the father survived. But in that case, it appeared in evidence, that the father, subsequently to his wife's death, and not twelve years before the institution of the suit, had acknowledged the debt of dower to be due. There does not appear to have been any case yet decided in which prescription from length of time has been held sufficient to bar the claim of a wife to her dower; should such case occur, the *reverentia maritalis* might possibly be considered to operate in her favour, agreeably to the doctrine of the Scotch law. See *Erskine's Principals*, page 369. But with respect to the heirs of widows, or even perhaps to the case of widows themselves who may have suffered a long period to elapse after the death of their husbands without preferring any claim, the rules of limitation may be strictly applicable.

1824. on her and her eldest son. That the plaintiff's husband had sold that land, and kept the proceeds, what remained of which the plaintiff had taken to herself, besides all the household furniture, which in truth belonged to her, the defendant: moreover, she had sold to one Meeqoo, for the sum of ninety rupees (and appropriated the price to herself) fifteen biswas of the contested land, which although paid for out of the common stock, had been purchased in the name of the plaintiff's husband; and lastly, that the remainder of the lands for which the suit was instituted had been bought by the defendant, and paid for by her own means alone.

Fuqeer
Moohum-
mud, v.
Mussum-
munt Kan-
dee.

The other defendant, Fuqeer Moohummud, simply denied the claim.

The plaintiff rejoined, that the first defendant had sold the lands of her husband in the Jan Bazar, and had paid off her debts with the purchase money, of which she the plaintiff had never received a farthing; that with regard to the fifteen biswas of land, they had been the private property of her husband, but the defendant had notwithstanding illegally sold them and retained the purchase money; that at the time when this sale took place, she (the plaintiff) resisted it as much as was in her power, but that both parties engaged in it despised her for her helplessness, and paid no attention to the opposition which she offered; that, in fine, the concluding allegation of the defendant, that she had paid for the remainder of the lands claimed with her own money, was wholly and utterly false.

At this stage of the proceeding the defendant Mukna died, and Fuqeer Moohummud succeeded as heir to all her property. When the case came to be tried, on the 17th of March 1817, the Judge of the Suburbs of Calcutta declared his opinion that the lands in dispute had been bought by the plaintiff's husband, but as she had not produced any deed of settlement, the fifteen biswas in the village of Tijila, the sale of which to a person named Meeqoo, she had attested, could not devolve on her; but that all that remained was her's by right of inheritance. A decree was therefore given in her favour, and it was ordered that possession of the three beegas of land should be given over to her; that in addition, the surviving defendant should either pay her the sum of 389 rupees, the value of articles which belonged to her, or surrender to her possession of the articles themselves; and that lastly, he should defray all the costs of Court.

The defendant being dissatisfied with this decision appealed, *in forma pauperis*, to the Provincial Court of Calcutta.

On the 25th of August 1820, the Senior Judge of that Court, after an examination of the proceedings of the case, affirmed the decree of the Zillah Judge, and dismissed the appeal, directing that the appellant should pay all costs in the event of any assets being subsequently realized.

Being dissatisfied with this decision also, he entered a special appeal in the Sudder Dewanny Adawlut, appearing again as a pauper.

His petition of appeal was admitted on the 14th of April 1821, for the reasons stated in the proceedings of the 8th and 24th of February of that year, and on the 6th of December of the same

year it was ordered that the respondent should be admitted to plead *in formâ pauperis*. 1824.

The cause came on for trial before the Second Judge of the Court (Courtney Smith) on the 5th of January 1824.

It appeared to the Court, that the claim of the woman Kāndee, wife of Shakir, was not supported by the deed of settlement now produced by her, since it was by no means certain that the disputed property was included in that deed; and although it was established by the various documents which had been produced, that that property belonged exclusively to the deceased Shakir, still it was not established that any thing beyond a wife's ordinary share of her husband's estate should devolve on her. There seemed to be no mention in any of the documents of the deceased having a son. Since, therefore, the deceased left three surviving heirs, namely, his wife, the present respondent, his brother, the present appellant, and his mother Makna, his property should be made into twelve shares and distributed among them in the following proportions: to the wife 3; brother 5; mother 4; and since the mother died soon after, her share should go to her son, the deceased Shakir's brother, and the appellant in this cause. Further, the ground on which, over and above the three beegas of land, the property (which at an estimated value of 389 rupees, was decreed to the present respondent) came to be rated at so high a valuation did not appear to the Court very clearly made out from any documents which had been adduced. That estimate did not in fact correspond with either the cost or the number of the articles left by the respondent's husband. But even had it entirely corresponded, she could not be entitled to more than a fourth part of it. Nor did it seem that there was any sufficient reason for imposing the fine of 50 rupees on Fuqeer Moohummud, as had been done by an order of the Judge of the Suburbs, dated the 29th of October 1816.

The Second Judge having taken all these circumstances into consideration, ordered that the decree of the Provincial Court of Calcutta of the 25th of August 1820, and the decree of the Judge of the Suburbs of Calcutta of the 17th of March 1817, with regard to the payment of the sum of 389 rupees, be reversed; and that in the matter of the three beegas of contested ground, it should be altered to the following effect; that that land be divided into twelve portions, three to be given to the respondent, and nine to the appellant, five for his own share of his father's property, and the remaining four as being heir to his mother. That the fine imposed on the present appellant of 50 rupees be remitted. That, however, the respondent should not be required to refund any thing of the rents which she received from the lands while in her possession. That the respective parties should pay their own costs in all the three Courts. The case being next brought before the Third Judge (J. Shakespear) on the 15th of January, the following question was put by him to the Mooftee of the Court. A man dies and leaves three heirs, his wife, his brother, and his mother. What share of his property, moveable or otherwise, does the law assign to each of these? and in case of the mother dying while the two others survive, on whom should the mother's share devolve? The law officers replied, that the property in such case should be por-

tioned out into twelve parts, three of which should go to the widow of the deceased, four to his mother, and five to his brother; and that, on the death of the mother, her portion should go to her surviving son, to the exclusion of the widow of her other son. This exposition of the law being conformable to the distribution of the property awarded by the Second Judge, and the Third Judge expressing his concurrence in the other parts of the opinion recorded by his colleague, a final decree was passed agreeably to that opinion accordingly (a).

1824.

PIR THEE SINGH, Appellant,

versus

Jan. 29th.

BISUMBER SAHEE, and others, Respondents.

The uncles of the plaintiff having mortgaged their shares of an estate to two individuals, and on those mortgagees absconding having made a second mortgage to another individual, from whom the plaintiff redeemed the property, held that a private distribution made among themselves by the first and second mortgagees cannot avail, as the first mortgagees had a right either to the whole or to no part of the mortgaged estate.

THIS was an action brought by the present appellant in the Zillah Court of Allahabad, on the 15th of September 1813, against Sauwul Singh, Nundee Lal, Beree Sal and Tejraee, to recover two thirds of a moiety of Monza Gooneer, in the Pergunna Mundagee, the annual rent of which was stated at 2,257 rupees.

It was set forth in the plaint, that Siblee and Sookh Lal, the plaintiff's uncles, had mortgaged the two thirds claimed to Fuzer Shah, father of the defendant Sauwul Singh, on the 25th of Moohurram 1176, F. S., executing regular deeds of mortgage for the same, which they had deposited with the mortgagees. That after the death of his uncles, the plaintiff had paid off the mortgage in the year 1210, F. S. to the aforesaid Sauwul Singh, and had got back the two deeds of mortgage, and at the same time a release of the abovementioned lands attested by the *vakeels* of the Court, and signed by Mr. Ahmuty, Resident. That he had the lands in his possession for eight months. That Deewan Singh (son of Nundee Lal) and Beree Sal conspiring with the other defendants, instituted an action against him in the Zillah Court, on the pretence of having turned them out of their property, which suit had been successful, and the cause summarily decided in their favour by a decree which enabled them to effect his expulsion from the estate. That when he (the plaintiff) had gone to serve under his brother in Scindiah's army, not having sufficient funds wherewithal to carry on a regular suit, Sujee Singh professing himself to be his brother, had brought an action for recovery; but he was nonsuited, on account of his not being in the relation of a brother to him. And that finally he had obtained permission to institute this regular suit to establish his proprietary right, since the summary process by which Deewan

(a) The legal share of a mother where there are no children nor sons children and only one brother or sister, is one third, and of a widow where there are no children nor sons children, one fourth; and where a fourth and a third share come together, the property should in the first instance be made into twelve shares. See Rules 14, 34 and 65, *Principles of Moohummudan Law*. The brother takes what remains as residuary after the legal sharers have been satisfied.

Singh and his associates obtained possession had not brought that point under review. 1824.

The pergunna in which the lands in dispute were stated to be, belonged to the Zillah of Cawnpore, to the Court of which district all the papers filed in the cause were accordingly sent. *Pirthas Sing, v. Biamber Sahlee and others.*

Nundee Lal, Beree Sal and Tejraa (the present respondents) replied to the statement of the plaintiff, that Sookh Lal had mortgaged his share on the 5th of *Jeth* of the *Sumbut* year 1817, to Umr Singh, of whose property Beree Sal was the heir, as had Siblee to Ujub Singh, of whom Tejraa was the heir, on the 17th of *Asarh* 1825. Five years afterwards, there was a defalcation in the rents of the two shares of the estate. Umr Singh and Ujub Singh having absconded, the respondent Nundee Lal, who was a joint proprietor of the other moiety of the estate, and a person named Fuqeer Shah (Sauwul Singh's father), made up that deficiency to the Collector's office, and sought repayment of what they had thus advanced from Siblee and Sookh Lal. That then Siblee sold to Nundee Lal his share, and Sookh Lal mortgaged his to Fuqeer Shah, signing and delivering all the necessary documents to him. That when Umr Singh and Ujub Singh came back, they quarrelled with the parties engaged in this new disposition of the estate. That at last they all agreed, on the recommendation of Siblee and Sookh Lal, to take each a fourth portion, which they actually did. That, about 30 years before the date of this suit, Sauwul Singh, son of Fuqeer Shah deceased, had mortgaged his fourth share to Nundee Lal and Beree Sal. That the property was therefore theirs. And if the plaintiff had paid the mortgage money to Sauwul Singh he must suffer for his ignorance. That although it be true that the plaintiff by the help of Nuwab Baqir Ulee Khan had taken forcible possession of the land, still the right was declared to be theirs, in accordance with the 32nd regulation of 1803. That lastly, they, the present defendants, knew not how the plaintiff could prove Siblee and Sookh Lal to be his uncles; and even could he do so, since Bujar Singh and others, children of Siblee, were ready to appear when called on, it was obvious that his claim to the property could not be entertained for an instant.

Sauwul Singh, the remaining defendant, stated in reply, that the plaintiff had in the year 1209, F. S., sought back from him the papers relative to the mortgage, which had been signed by Sookh Lal and Siblee. That he, however, had replied, that although the mortgaged property was formerly in his possession, yet that he had thirty years ago, given them away on a second mortgage to Beree Sal and others. That the plaintiff then said, "that he was by profession a soldier, and would get a letter of recommendation to the Collector, who would invest him with the proprietorship of the lands. That if he (the defendant) would deposit the papers with Hindoo Singh, zemindar of Beithnapoor, &c. he (the plaintiff) would deposit the amount of the mortgage with the same person. And that if he got permission to enter on the estate, they should exchange the money and documents respectively." That they both consented to this arrangement. That he faithfully observed his part of it; Hindoo Singh executing an engagement to the

1824.

Pirthee
Sing, v.
Bisumber
Sahee and
others.

effect above stated. That, moreover, the plaintiff made him write out a receipt in full for the whole sum for which the property had been mortgaged, but that out of 763 rupees, 4 anas, the amount of that sum, he had only received 355 rupees, 4 anas, 3 pie, so that in fact the plaintiff was still in his debt.

About this time, the defendants Beree Sal, Nundee Lal, and Tejraee, died, and were succeeded by their respective sons, Aman Singh, Bisumber Sahee, and Dil Buksh Rai.

The decree of the Zillah Judge of the 18th of August, 1818, recited, that the two deeds which the defendants, Nundee Lal, Beree Sal, and Tejraee, had alleged to have been written five years before the other two given by Sookh Lal and Siblee to Fuqeer Shah, were not supported by any proof, and that, therefore, whatever claim the whole of the four defendants might possess must be grounded upon the last two deeds. That as to what had been said about Nundee Lal and Fuqeer Shah having paid the dues to Government on the absconding of Umr Singh, and Ujub Singh, the first mortgagees, and getting for doing so two mortgage deeds from Sookh Lal and Siblee, both made out in the name of Fuqeer Shah, and then consenting, when the first mortgagees returned, to make an equal division into four parts; this is a matter depending entirely on the pleasure of Nundee Lal and Fuqeer Shah, and not arising from any right of possession belonging to Umr Singh and Ujub Singh. That if Umr Singh and Ujub Singh had in virtue of the first mortgage a right to a part of the land, they had a right to the whole of it. But the fact of Nundee Lal and Fuqeer Shah having got possession of even a portion of it in virtue of a second mortgage, was tantamount to a reversal of the first mortgage; and whatever the first mortgagees might get of the land, subsequently to the date of the second mortgage deed, must be considered as a gratuitous concession to them by the second mortgagees, not as being their right. That, in consequence, although Nundee Lal, Beree Sal, and Tejraee did, apparently, obtain portions of the property, such acquisition cannot be looked upon in any other light than as a grant from Fuqeer Shah, who was the sole ostensible mortgagee. That, moreover, the defendants do not deny the authenticity of the mortgage deed produced by the plaintiff, which is corroborated by the deed of release signed by Sauwul Singh, son and heir of Fuqeer Shah. That it were impossible to place any confidence on the simple assertion which, to invalidate that deed of release, had been made by Sauwul Singh, namely, that although all the money had not been paid, he signed the deed in compliance with the wish of the plaintiff and the advice given him by Hindoo Singh. That this assertion was the more to be distrusted, as the defendant had made no effort either to bring Hindoo Singh to give evidence in person, or to obtain from him a statement of the facts of his connection with this transaction, although the said Hindoo Singh was alive. That the former decree of the Zillah Court of Allahabad in the case of Tujee Singh *versus* the present defendants, was of no avail to establish the present claim of the defendants; since it was given on the simple ground of the right of the present plaintiff being superior to that of Tujee Singh. On these grounds a decree was passed, with

costs, in favour of the plaintiff. It was provided, however, that the decree should in no way invalidate the claim of nearer heirs to the property of Sookh Lal and Siblee, should any such appear. 1823.

Sauwul Singh, Bisumbur Sahee, Dil Buksh Rai, and Aman Singh, being dissatisfied with this decree, appealed to the, Provincial Court of Bareilly. The Fourth Judge of that Court agreeing with the opinion of the First Judge, as expressed in the proceedings of the 6th of May 1819, ordered, on the 25th of that month, that the decree of the Acting Judge of Cawnpore (dated as above) be reversed, and the respondent pay the costs of both Courts, on the ground that he had not established the fact of his standing in the relation of nephew to the original proprietors, as alleged by him.

Pirthee Singh, v. Bisumbur Sahee and others.

Pirthee Singh appealed from this decision by entering a petition for a special appeal, which was admitted on the 23rd of September 1820, in the Court of Sudder Dewanny Adawlut, on the grounds that there had been no transfer of proprietary right; in consideration of the circumstances stated in the reply of Sauwul Singh; and from the fact of the appellant having obtained possession in the year 1210, F. S., by order of Mr. Ahmuty.

The case came to hearing before the Second Judge (C. Smith) on the 22nd of December 1823, and it being established by further evidence, which had been called for, that the appellant was, in point of fact, as he stated, the nephew of Sookh Lal and Siblee, and there appearing to have been no sufficient reason assigned by the Provincial Court for the reversal of the Zillah decree, the Second Judge recorded his opinion, that the decree of the former Court should be rescinded and that of the latter affirmed. In this opinion he was joined by the Third Judge (J. Shakespear) and a final decree was passed accordingly.

TALIWUR SING, Appellant,

versus

PUHLWAN SING, Respondent.

1824.

Feb. 2nd.

THIS was an action brought by the present respondent, in the Provincial Court of Patna, against the present appellant, on the 17th of June 1817, to obtain possession of half of the assessed talooks of Kujra Gosal, and Sahmora, the triennial rent of which was stated to be 1,022 rupees, and of half of the rent free mouzas of Bun Jhola and others, valued at 4,100 rupees, the whole situated in the Pergunnas of Nussickpoor Goreea and Otturkhund, in the district of Tirhoot.

In a division of property among Hindoos, priority of birth does not entitle to a larger portion.

The plaint set forth, that the lands in question were left to the plaintiff and his brother Munooruth Singh (father of the defendant), by their father Jogee Singh. That he and the said Munooruth Singh, remained in joint possession, dividing equally the profits received from the whole estate, without appropriating any particular portions to either, till the year 1210, F. S.; that in that year he discovered that his brother had, in 1207, F. S. mortgaged or conditionally sold two of the mouzas in the Talook Sahmora for a

1824.

Taliwar
Singh, v.
Puhlwan
Singh.

term of years to a person named Jorawun Jha, without his (the plaintiff's) consent or knowledge; that on this, separating himself from his brother, and leaving the whole of the moveable part of the property in his hands, he took possession of half of the landed estate in his own right; that to avoid the recurrence of the altercations which took place regarding the two mouzas which had been mortgaged, his brother Munooruth Singh, brought an action with a view of compelling Jorawun Jha to allow him to redeem the mortgage; that in the course of the proceedings in that case, it appeared that he (the plaintiff) had a clear right to half of the lands included in the mortgage, and on the establishment of that right, the transaction, to which he had not been privy, was held invalid, and he and his brother were vested with the proprietorship of equal shares of the land by a decree of the Zillah Judge, which was confirmed on an appeal to the Provincial Court; that he, and the defendant, as heir to his father Munooruth Singh, were still in possession of these equal shares; that he had been in the habit, during the life time of the said Munooruth Singh, of paying together with him the revenue for the whole estate to Government, and that after his death he had continued doing so with his son, the defendant; that the defendant had occasionally failed in paying his share of the *jumma*, and to prevent any of the common estate being publicly sold, he (the plaintiff) had been obliged to make good the arrears to his own great loss; that to obviate this, he had applied to the Collector for a division of the estate, and had by him been referred to a court of justice to obtain an order for such a division declaratory also of the proportions in which it should be made.

The defendant replied, that the following was the true account of the separation which had taken place in the year 1210, F. S. In that year his father Munooruth Singh, and his uncle the plaintiff, divided their paternal estate between them, according to the established usage of their family, and had mutually exchanged acknowledgments confirming that division. The date of this transaction was distant from the date of plaintiff's plaint sixteen years, and therefore the present action was inadmissible by the 14th clause of regulation 3, 1793. With regard to the mouzas which had been mortgaged, as indeed the plaintiff himself confessed, before the year 1210, F. S., the date of the above mentioned separation, they had been sued for at first in his father's name exclusively, and after his father's death, in his (the defendant's) own name and at his own expence. He alone had got possession by the decrees of the Zillah and Provincial Courts; and lastly, the order of the Board of Revenue in year 1222, F. S., for the rent of these mouzas, was in his own name also, and the authority to act was directed to him solely.

The defendant averred, further, that the object of the plaintiff in bringing this suit against him was to obtain a mouza, which, in his agreement, written in the year 1210, F. S., he had consented to give up to his (the defendant's) father, he being the elder brother and having a right to a larger share in the division, as being prior in birth, which rule the defendant insisted should be enforced, as being the law of inheritance, to the benefit of which he was entitled.

The decree of the Third Judge of the Provincial Court, dated February the 17th 1821, recited, that the plaintiff and Munooruth Singh, father of the defendant, possessed equal claims to the property left by their father Jogee Singh; that it appeared on examination that the names of both parties were entered in the records of the Collector's office as proprietors of the whole common estate; that therefore no credit could be given to the assertion of the defendant, that a division had taken place of both the land and the *jumma* levied on it; that such a division of property left by their father as should give a larger portion of it to the elder of two brothers was forbidden by the *shasters* in this age; and that, for the above reasons, no witnesses whom the defendant could adduce would be of avail to establish his claim, or prevent a division of the lands by the Collector, in the manner and under the forms prescribed by regulation 19, of 1814; and that the plaintiff was therefore entitled to judgment, which was given in his favour accordingly.

The defendant, dissatisfied with this decision, appealed to the Court of Sudder Dewanny Adawlut; a petition was entered also by some persons, Jet Ram Singh and others, on the 22nd of May 1823, stating that the mouzas of Rughoonathpoor, &c. included in this case, were in fact theirs, and not belonging to either of the litigant parties, and praying that no order might be given which might affect their proprietary rights. The petition was ordered to be laid before the Court when the case itself came on. It was brought to a hearing on the 2nd of February 1824, before the Second Judge (C. Smith), who gave judgment to the following effect: That it appeared, that in all the numerous documents regarding the contested estate, which had been produced by the appellant in the action regarding the mortgaged part of it, before the institution of this suit, no mention had been made of the deeds of partition and acknowledgment now brought forward, nor had he advanced any claim on the ground of his father's priority in birth to the respondent; that, therefore, no confidence could be placed on the authenticity of those two deeds; and although the appellant had stopped the *Aumeen* appointed by the Collector from proceeding in a division of the land, by asserting that the respondent had not a right to an equal portion with himself, still that assertion could not be viewed in any other light than as an expedient to obtain delay; and that with regard to the petition entered by Jet Ram Singh and others, it was sufficient to provide that if they had a legal claim to advance, they were at liberty to do so. The appeal of the appellant was therefore dismissed, and the decision of the Provincial Court affirmed (a).

(a) The right of primogeniture which was recognised by the ancient Hindoo law is of no force in the present day. There are many laws enacted by *Menu* which were confined to the three first ages of the world. A work called the *Madana Ratna Pradipa* contains a collection of them. Among them are the following rules: "The sacrifice of a bull, or of a man, or of a horse, and all spirituous liquor, must in the *Cali* age be avoided by twiceborn men; so must a second gift of a married young woman, and the larger portion of an eldest brother, &c. &c." See the general note by Sir William Jones at the conclusion of his translation of the Institutes of *Menu*.

1824.

Taliwar
Sing, v.
Puhlwan
Sing.

1824.

RAJA PUTNEE MULL, Appellant,

versus

Feb. 14th.

THE COLLECTOR OF ALLAHABAD, Respondent.

Held that a rent free tenure confirmed by the former Lieutenant Governor of the Ceded Provinces, Mr. H. Wellesley, is not resumable.

THIS was an action brought by the appellant against Government, on the 11th of November 1815, in the Benares Provincial Court, for possession of Mouza Muhgawan, in Pergunna Chamul, and its dependencies, as a rent free estate. Eighteen times the annual produce was computed at 90,000 rupees. It was set forth in the plaint, that Rai Khealee Ram, the appellant's grandfather, acquired the mouza by an *altumgha* grant from the Emperor Shah Aulum, dated the 21st *Rubbee Oosanees*, in the seventh year of that emperor's reign, and held possession under this title till Shah Aulum's return to Delhi, when Khealee Ram retired to Patna, and the estate was seized by the Nuwab Wuzeer, together with all the rent free lands in the province : but that the plaintiff afterwards regained the property under a *purwanna* acknowledging his hereditary *altumgha* title, from the Nuwab Usufow Dowlah, countersigned by his minister Tufuzzul Hoossain Khan, under date the 5th of *Sufur* 1211, A. H., and continued in unmolested possession (as agreements entered into with him by the farmers would testify) till the district was made over to the Company, when the Collector (Mr. Ahmuty) after full enquiry, gave him a *purwanna* confirming his free tenure, with the sanction of the Lieutenant Governor (Mr. H. Wellesley), on the 3rd of March 1803 ; that the present Collector had however, under authority of the Board of Commissioners, ordered the lands to be resumed in the preceding year (1814), and had directed the plaintiff to prove his right by a regular suit, although he had already submitted to that officer's inspection the title deeds enumerated above, which it was argued were conclusive in favour of his right to the estate under clause 2, section 2, regulation 36, of 1803.

The Collector maintained in answer, that the plaintiff's right to the property in virtue of the imperial grant was barred by its having been resumed previous to the year 1204, F. S., and by his not having held uninterrupted possession since that period ; it appearing from the public records of his office, that the mouza was, along with other *Khalsah* lands, let out to farmers under the usual engagements from the year 1206 to 1211 F. S., that there was no precedent of any mouza subject to Government assessment having been alienated by an order of the Lieutenant Governor ; that no order at all had been registered in the present instance, and that it did not appear that the Lieutenant Governor was by the regulations invested with such authority ; that if the plaintiff had actually held the mouza free of assessment, it would have been so registered, and a corresponding deduction made in the account of the total net revenue of the pergunna, drawn up by the *canoongoes* from the books of the Nuwab's manager, and also in Colonel Scott's list ; that Meer Hadee Ali, who was surety to the Nuwab's Government for the due performance of their engagements by the farmers, had brought a suit and obtained judgment in the Zillah Court

against the *Maliks* of Muhgawan for arrears incurred by them between the years 1202, and 1207 F. S., and that on the formation of the triennial settlement, after the province came under the Company's administration, in the beginning of 1210 F. S., regular zemindaree engagements were executed by Ruheem Ali, and Nujuff Ali for the talook of Baboollahpoor and its dependencies, including the mouza now claimed. 1824.
Raja Put-
nee Mull, &c.
The Col-
lector of
Allahabad.

Judgment was given against Raja Putnee Mull on the 26th of July 1820, by the First Judge of the Provincial Court; the mode of investigation followed by the Collector (Mr. Richard Ahmuty), being found to vary from that laid down in regulation 8, of 1811; and it appearing to the First Judge, that the documents brought forward by the plaintiff to prove his possession were unsatisfactory, that the order said to have been passed by Mr. Wellesley was not on record, and that the mouza was not mentioned in the list of rent free lands prepared by Colonel Scott.

On appeal to this Court the cause having come on first before the Second Judge (C. Smith), an application was preferred on behalf of the appellant purporting that the Lieutenant Governor's letter might be found in the office of some of the Secretaries to Government, Mr. Smith understanding, on enquiry, the defence set up to be merely that the document was not to be found, was decidedly of opinion, that Raja Putnee Mull was entitled to a decree, under section 11, regulation 3, 1803, on the grounds set forth in his plaint. He observed, that the *purwannas* of Usufoo Dowlah and his minister, appeared from the Collector's record to have been produced and proved before Mr. R. Ahmuty, and admitted by the Lieutenant Governor as good title of a free tenure, on that gentleman's report; that the plaintiff's previous possession was established by engagements executed to him by Rai Joogul Kishwur, and Raja Dhumput Rai, attested by respectable neighbouring landholders, which were also submitted to the former Collector; and that his unmolested free tenure from the 3d of March 1803, the date of the *purwanna* granted to him, on the faith of those documents, expressly purporting to be issued under the Lieutenant Governor's sanction, till the month of May 1815, a period of more than twelve years, was fully sufficient to invalidate the objection of the sanction not being forthcoming on record; that it never could be believed, that the Collector had lost himself so completely as to record a transaction of this nature contrary to fact; and that it was incumbent upon Government to produce a copy of Mr. Wellesley's answer, if his decision was against the Collector's report, and the plaintiff was not to blame if they could not do so; that the Board of Commissioners were incompetent, under regulation 8, 1811, to dispossess the occupant of lands; held free of assessment, after his right had been admitted, without instituting a regular suit; and that, although the regulation in question bore date subsequent to Mr. Ahmuty's inquiry, this gentleman could not be held inferior in authority to the present Collector, nor the Lieutenant Governor to the present Board of Commissioners; that the documents filed in proof of the mouzas having been subject to Government assessment from 1206 to 1210

1824. F. S. were unsatisfactory, resting on the sole authority of the same *Canoongoes*, who were mentioned in Mr. Ahmuty's proceedings to have been examined by him, and who must clearly, notwithstanding their assertions to the contrary on the present trial, have then told a very different story; and in fine, that Colonel Scott's list was not by the regulations a standard for determining what lands were rent free; on the contrary, that several instances of the inaccuracy of that paper had occurred within his (Mr. Smith's) recollection; and that in the present cause, Bhola Bakel, *Canoongoe*, had acknowledged that he never was called upon by the Nuwab Wuzeer's Government for a return of lands held free of assessment in his *pergunna*; which would sufficiently account for the lands at issue not being comprised in that list.

Raja Put-
nee Mull, v.
The Col-
lector of
Allahabad.

The Third Judge (J. Shakespear), who next took up the case, was of a contrary opinion, and considered that the decree passed by the Provincial Court ought to be confirmed, remarking that the appellant had failed to prove his possession of the lands free of assessment previous to the year 1801, as required by regulation 36 of 1803; but, on the contrary, had made up a story of his having given the estate in farm to the Nuwab's Aumil after the *altumgha* was restored to him by Usufow Dowlah, with a view to disguise the fact, that possession was retained by the ruling power; that it appeared from the result of a reference to the Territorial Secretary, and from a perusal of a paper transmitted by that gentleman, that Mr. Wellesley was not invested by the Supreme Government with power to confirm rent free grants, and that allowing the Lieutenant Governor to have passed the present order, it had evidently never been confirmed by Government.

The Officiating Judge (J. Ahmuty), however, concurred in opinion with the Second Judge, that the plaintiff had established his claim to hold the lands free of assessment, under the existing regulations; and considered, on the question of the Lieutenant Governor's authority to confirm *altumgha* tenures, that in the absence of any express enactment on the subject, as appeared from the Territorial Secretary's letter, Mr. Wellesley must be presumed to have had that power conferred on him, by his commission for the settlement of the Ceded Provinces. A final order was therefore passed, reversing the decree of the Benares Provincial Court, and adjudging the appellant's claim to hold the mouza, as an hereditary rent free tenure. Government was declared liable to all costs, and subjected to the payment of mesne profits. (a)

(a) Two petitions were subsequently presented for a review of judgment in this case, agreeably to the instructions of the Superintendent of Law Suits. The first, on the ground that Mr. Henry Wellesley had not the power to confirm any rent free tenure, but this petition was rejected by the Second and Fifth Judges (C. Smith and W. B. Martin). In the interim, regulation 14, 1825, was enacted, to declare that no grants to hold land free of assessment, unless made or confirmed by the persons specified in that enactment, should be held valid; and to provide retrospectively that any decision passed in opposition thereto might be reviewed without reference to limitation of time, and that the application for review, in such cases, should be decided by a majority of the Judges of the Court. Under these rules, another petition for review was presented on behalf of Government, but this also was finally rejected, (on the 29th of April 1826) by the two Judges above named, joined by the Chief Judge (W. Lyeester); it appearing that Putnee Mull had held possession of the disputed lands as a rent free

MUSSUMMAUT DEEPOO (Pauper), Appellant,
versus
 GOWREESHUNKER, Respondent.

1824:

Feb. 23rd.

THE respondent brought this action in *forma pauperis*, on the 4th of December 1809, in the Patna Provincial Court, against the appellant and a person called Dussoo, to recover possession of half mouza Muchrawan, a *mokurreree istimreree* tenure in the vicinity of Patna, and half mouza Monhur, a mortgaged *altumgha mehal* in pergunna Sewut, as well as buildings, gardens, and moveables, appertaining to the estate of the late Gooloo Chowdree: suit laid at 9,001 rupees, annual produce of the lands, value of the buildings, &c. The subjoined is a genealogical sketch of the family in this case. (a)

The plaintiff set forth, that Gooloo Chowdree died in *Assin* 1213, F. S., leaving the plaintiff, his father's brother's grandson, and his brother's son Juggoo (husband of the defendant, Mussummaut Deepoo), heirs to the above ancestral property; that by the death of Juggoo, which happened on the 2nd of *Magh* 1216, F. S., the plaintiff was entitled to succeed to the share enjoyed by him, to the exclusion of his widow Mussummaut Deepoo, who, according to usage and the Hindoo law, could claim maintenance only from his estate; but that as she had ejected the plaintiff, put her husband's nephew and sister's son (the defendant Dussoo) into possession, and enjoyed the proceeds of the above property, the plaintiff now sued and hoped for redress.

The defendant, in reply, stated that the plaintiff was not Gooloo's heir; that nearly seventy-five years ago, Sumbhoonath and Bholanath, own brothers and grandfathers respectively, to the plaintiff and Juggoo Chowdree, amicably divided between themselves two dwelling houses left by their father, Anoop Singh, exchanged acquittances, and lived separately; that the plaintiff was in exclusive possession, as heir, of his own grandfather's property; that the wife of Hurnath (Bholanath's father-in-law) had adopted her own husband's grandson, Busteeram, who was Gooloo's brother, and had put him in possession of all her estates, property, business, &c.; that he accordingly retained possession during his life time, and on his death Gooloo succeeded to one half, and the remaining moiety descended to Juggoo and Dussoo, the son and grandson of Busteeram, whom Gooloo on his death had entrusted to the care of Lala Behadoor Singh, declaring them his sole heirs; that Dussoo sold his jewels to pay debts due from the estate to several bankers, but that there was still a balance unpaid; that if the plaintiff had really been Gooloo's heir, he would have performed the usual ceremonies on his death, and taken possession of his property, but this had been done by Juggoo; that the plaintiff's statements as to the houses in dispute having been derived from her father and grandfather was altogether false, inasmuch as

According to the Hindoo law, as current in Behar, the grandson of a paternal uncle is excluded by a brother's son, and, on the brother's son's death by his widow, if the family were divided; and according to the same law a boy adopted by the *Kritrima* form takes the inheritance both in his own family and in that of his adopting parents.

tenure under a *sunnud* from the Nuwab Usufoo Dowlah from the year 1204 F. S., up to the period of the Company's accession, and that consequently the merits of the case could not be affected by the question as to whether the Lieutenant Governor was or was not competent to make or confirm a grant.

(a) *Vide* subsequent page.

the two houses in Sanmokhun Koocheh, which were left by Bholanath's father-in-law, were inherited by Gooloo, and were mortgaged by him; that the defendant, Deepoo, was in possession of one house purchased and built by Gooloo with his own money; and that mouza Muchrawan was purchased by Gooroopershaud Singh, *alias* Poosoo Baboo, Gooloo's son, in copartnership with Meer Burkut Oolah Khan, and was still in mortgage, and not in the defendant's possession; that mouza Monkur, which was rented by Gooloo from the heirs of Gholam Reza Khan, was, after his death, resumed by the proprietor; that there was no garden at Lohaneepoor belonging to Gooloo; that Gooloo and Poosoo had sold all their moveables to discharge the incumbrances on the estate, and that the plaintiff's claim was therefore altogether unfounded.

1824.

Mussum-
maut Dee-
poo, v.
Gooree-
shunker.

The plaintiff, in reply, denied that the property left by Anoop Singh had been divided, or that acquittances had been exchanged by Sumbhoonath and Bholanath, and stated, that, as the grandson of Gooloo's paternal uncle, he was the sole heir to his property after the death of Juggoo. The defendants in rejoinder repeated their former allegations.

The Judge of the Provincial Court, on the 27th of April 1813, observed, that it appeared from the defendant's answer that Busteeram had been adopted by his maternal grandmother, the wife of Hurnath, and the pundits had declared their opinion, that, in consequence of Busteeram having been thus adopted by a stranger, his son Juggoo could not succeed to Gooloo's property; but that Gowreeshunker, son of Bishennath Singh, was the proper heir. He therefore (disbelieving the defendant's statement as to the disposition of the immoveable property) passed a decree awarding to the plaintiff the lands, houses, and garden, mentioned in the plaint, dismissing his claim to the moveables, and making the costs payable jointly by the parties.

The appellant preferred an appeal to this Court, and the case came to a hearing on the 22d of November 1820, before the Third Judge (S. T. Goad), when it was referred back for further evidence as to whether the lands in dispute were actually left by Anoop Singh the ancestor of the parties, and whether the property left by him was divided between his sons Bholanath and Sumbhoonath or their descendants, namely, Bishennath the respondent's father, Busteeram father of Juggoo, the appellant's husband.

The case came next to a hearing before the Officiating Chief Judge (J. H. Harington) on the 9th of February 1824, who observed that it appeared from enquiries made in conformity to the order of the Fourth Judge (Mr. Goad), dated the 22d of November 1820, that none of the property in dispute was left by Anoop Singh, except two small houses situated in Mehul Shah Bagh, where Anoop Singh resided, and which were possessed on his death by Bholanath his son, Gooloo's father, that the plaintiff exchanged in 1215, F. S., with Lala Moolchund for these two small houses which had been Bholanath's portion, (and subsequently sold by his heirs), a large house in the same mahal left by Anoop Singh, and possessed by Sumbhoonath his son, the plaintiff's grandfather; that this was proved by the deposition of Lala Mool-

1824, chund himself; that, although the division of Anoop Singh's property between his two sons could not be positively proved, owing to the long lapse of time, still there was every reason to suppose that such a partition did take place, from the circumstance of the heirs of both brothers being in separate possession of their respective houses, and from their not having for a long time associated, lived, or traded together. A copy of this proceeding, with the genealogical table, admitted to be correct by the *rakeels* of the parties, was then ordered to be laid before the Pundits of this Court, that they might state, according to the Hindoo Law as current in Behar, first, on the death of Juggoo Baboo, who was heir to his and to Gooloo Baboo's property? and if his widow, Mussummaut Deepoo, was entitled to possession for life, to whom should it descend on her death? secondly, whether the adoption of Busteeram, the father of Juggoo Baboo, by his maternal grandmother, the wife of Hurnath, barred the right of Juggoo as heir to succeed to the property of Gooloo Baboo? Their reply was to the following effect: it is understood that there was formerly an individual by name Anoop Singh. He had two sons, by name Bholanath and Sumbhoonath. Of the three houses possessed by Anoop Singh, Bholanath took the two smaller ones and Sumbhoonath the larger; and although they executed no formal deed of separation, yet they and their descendants from that time lived apart, and conducted their respective affairs separately. This is a proof that partition was made by Anoop Singh, which is farther corroborated by the fact of Gowreeshunker, grandson of Sumbhoonath, having exchanged the large house possessed by that individual for the two smaller ones which had been sold to a stranger; and by the property being proved to be divided. Bholanath's grandson, Juggoo, is heir to his portion of the property in default of his son Gooloo, and on the death of the said Juggoo the property which he had so inherited, by reason of his having no issue, will devolve on his widow Mussummaut Deepoo, at whose death it will go to her late husband's nearest *Sapinda*. This is the doctrine laid down in the *Mitakshura* and other law tracts current in Behar. Authorities, "Should a doubt arise whether a legal partition have been made among heirs, it must be cleared by the testimony of their kinsmen in the first place, then by written evidence of a partition, if there be any; if not, by verbal proof of their separate acts. When coheirs have made a partition, the acts of giving and receiving cattle, grain, houses, land, household establishments, dressing victuals, religious duties, income and expences, are to be considered as separate, and as proofs of a partition."—*Nareda*, cited in the *Vivada Chintamunee*, *Veera Mitrodaya*, *Vyavahara Mayucha* and other works. "A wife, daughters, both parents, brothers, their sons, kinsmen sprung from the same original stock, a pupil and a fellow student in theology; on failure of the first, &c." *Yajnyawalkya* cited in the *Mitakshura*.

Secondly, although Busteeram, the father of Juggoo Baboo, was adopted by his maternal grandmother, the wife of Hurnath, still, according to the *Kritrima* form of adoption, which prevails in Behar, and conformably to which the said Busteeram was adopted, his son Juggoo will not lose the right of inheritance in his own

1824,
Mussum-
maut Dec-
poo, v.
Gowree-
shunker,

family, because a *Kritrima*, or, as it is vulgarly called, a *Kurta soh*, retains the right of succession and of presenting the funeral cake, both in the family of his natural and of his own adopting father. Consequently, on the death of Gooloo, his brother's son Juggoo will inherit his property. Authority, "Such son (alluding to the *Kritrima*) offers the funeral cake to the person who adopts him, but the office of presenting the funeral cake to his own father and other relations still continues nevertheless." *Roodrudharopadhyaya*, cited in the *Soodhi Viveka*. 1824.
Mussum-
mayt Des-
poo, v.
Gowree-
shunkur.

On a consideration of the above legal opinion, it appearing to the Officiating Chief Judge, that Juggoo, and on his death his widow Deepoo, the appellant, had clearly a right to the property left by Gooloo, and consequently that the decree of the Court below, in favour of the respondent Gowreesunker, was wholly erroneous, that decree was reversed (the Officiating Judge, J. Ahmuty, concurring), and an order was issued that the respondent should restore possession of the property in dispute to the appellant, with mesne profits while enjoyed by him, and pay also the costs of suit in both Courts.

JUGUNNATH, and others, Appellants,

versus

RUGHOONATH DAS, Respondent.

-1824.

March 1st.

THIS was an action brought by Bruj Bulubh Das, *in formd pauperis*, in the Zillah Court of Midnapore, on the 20th of August 1807, against the present respondent, to obtain a two ana, one cowrie, and one krant share of the talooks of Damoodarpoor, Jug Sonjun and others, in the pergunna of Octur Behar, valued at 2,444 rupees. Claim by the uncle of the respondent to a share of an hereditary estate which had, prior to the promulgation of regulation 11, 1793, devolved entire on the respondent in right of primogeniture agreeably to a custom of the family, rejected, although the estate was not of the nature described in regulation 10, 1800, and held that,

The plaintiff stated, that his grandfather, Junma Bhan Chowdhree, and his brother Mudhoo Soodun Das, had divided a seven and half ana share of some lands, which they had chiefly derived from their ancestor Gunga Das Chowdhree, in the following proportions, namely, a five ana share, which belonged to the Chowdhree was awarded to Junma Bhan the elder brother, and the remaining two and a half ana share, which they had themselves purchased, to Mudhoo Soodun the younger brother. That when the plaintiff's grandfather died, Huree Kishen, the defendant's father and the plaintiff's brother, with Ram Narayun another brother, and the plaintiff himself, remained in joint possession of the five ana share appertaining, as above mentioned, to the Chowdhree, with an additional one and half ana share which had accrued to them by purchase in the mouza of Sahu Muna, &c. That Huree Kishen's name was, on account of his being the oldest of the three, the only name which was used in all transactions regarding the lands. That the plaintiff sued for his separate share in the year 1179, *Umlee*, in the Zillah Court of Midnapoor, but the cause was not brought to a conclusion on account of the Judge having proceeded to the Presidency; that after this, Huree Kishen died,

1824. when the defendant was still in his minority, on which account the plaintiff entered a suit against the widow of the deceased in the Zillah Court of Burdwan in the year 1182 *Umlee*; that this also had not been decided, because Beer Purshad Rai, head of the *Chuckla* of Midnapore, who had been appointed to investigate the circumstances of the parties, withdrew from the performance of that duty; that then the aforesaid widow practised underhand contrivances to have the defendant's name substituted for his father's in all transactions connected with the lands in question; on hearing of which attempts, the plaintiff was on the point of bringing a third action, but the widow being afraid to meet it, came to a compromise, and admitted him to a participation in the profits of the estate; that after that, again he in the year 1201. *Umlee*, sued the defendant, but as at that time the regulation providing for the payment of institution fees was promulgated, and the plaintiff had not the means of furnishing that payment, he withdrew his suit, and gave a written release of all his claims; that lastly, it should be stated, that before the period last mentioned, a one and half ana share of the mouzas of Gungapore, &c. had been sold by Government for arrears of revenue, and a seven gunda share of the mouza of Lalpoor, &c. had been purchased with the money belonging to the common stock in the name of the defendant, as also a six gunda share of Jug Soojun, &c. in the name of Judoo Bundun, the defendant's brother; on which the defendant, in spite of the right of the plaintiff in all these lands, had in the year 1209, *Umlee*, expelled the plaintiff from the house in which they had always lived together, affixing his own signature, only to all documents relating to the above mentioned lands, and other property belonging to the common estate, the whole of which he took into his own possession.

The defendant alleged in reply, that it had been the custom of their family from the time of Gunga Das, his great grandfather, that none but the eldest son should inherit any part of the estate; that the brothers of Gunga Das had never held any portion of it; nor on Junma Bhan's succeeding to his father Gunga Das, had Mudhoo Soodun, his younger brother, shared in the five ana share left by Gunga Das, but had obtained only what was sufficient for his support and maintenance; that what had been stated by the plaintiff regarding the two and half share which he pretended had been given to Mudhoo Soodun was entirely incorrect, for that Junma Bhan had given that share (which he had purchased with his own means) not to Mudhoo Soodun, but to Mudhoo Soodun's son, his nephew, Nidhur Das, whom he had always treated as his own child; that on the death of Nidhur Das, that share had devolved on the eldest of his three sons, Purtab Narayun, and at his death, on his eldest son Jye Narayun; while the brothers of Purtab Narayun and of Jye Narayun never received more than the necessities of maintenance. That when Lal Biharee Chowdree, son of Junma Bhan died, the said Junma Bhan divided his property between the sons of Lal Biharee, viz. Huree Kishen, Huree Narayun, and the plaintiff, according to the usual practice of their family, leaving to Huree Kishen (the eldest of the three brothers, and the defendant's father) the proprietorship of the zemindaree; that on his

death, Huree Kishen having got an official grant of the estate, and having bought besides, with his own money, a one and half ana share in the talooks of Sahu Mund, &c., supported the three brothers, and on his death he left all his property to him (the defendant), who from that period to the date of the action being instituted against him, including in all thirty-six years, had held it without participation with or opposition from any one. That when in the year 1174, *Umlee*, the plaintiff left the house in which they had before lived together, he compounded for the sum of one hundred rupees for his yearly support at an estimate fixed by an umpire, to whom they had referred the case, on a consideration of the custom established in the family, and had given a written acknowledgment of his consent to the sum fixed: that the plaintiff's own statement even proved his having received this maintenance from the defendant's father. That although it was true that the plaintiff had brought an action against the defendant's father in the Zillah Court of Midnapore in the year 1179, *Umlee*, still he had recovered all that he had sued for, namely, what remained unpaid of the maintenance settled for his support, which was awarded to him by a decree of that Court, and the business was concluded by both parties coming to an agreement and executing an acknowledgment to that effect. That with regard to the suit brought in the Burdwan Court, (alleged by the plaintiff not to have been carried to a decision) the truth was that the Judge of Burdwan adverting to the decision already given in the Midnapore Court, and the insufficiency of the proofs adduced to establish the plaintiff's right, had not proceeded with the case, issuing only an order confirming the possession of the zemindaree to the defendant, and providing at the same time for the support of the plaintiff and of the other members of the family; and that finally, when the plaintiff instituted his last suit in the year 1202, *Umlee*, the real reason of his signing the deed of release was the evident weakness of his claims.

1824.

Jugunnath
and others,
v. Bughoo-
nath Das.

The Judge of the Zillah Court of Midnapore decided the case against the plaintiff on the 5th of December 1809, on the ground that between the period at which he had instituted his first suit in the year 1182, *Umlee*, which was never regularly proceeded in, and the date of his second plaint in the year 1201, of the same æra, when he signed a deed of release, nineteen years had elapsed; he having brought no other action in the interval.

The plaintiff, Bulubh, dying, his sons Jugunnath Das and others brought the case by appeal into the Provincial Court of Calcutta, the Second and Fourth Judges of which Court, on the 28th of February 1816, holding that the deceased plaintiff had instituted his action before the twelve years fixed in the rule of limitation had elapsed, ordered the case to be struck off the file of that Court, and sent back to the Zillah Judge of Midnapore to be tried *de novo* on the merits.

The case was accordingly restored to its place on the Zillah file, when a petition was presented by a woman named Arsadee, stating that she was the widow of Judoo Bundun Das, the second son of Huree Kishen Chowdhree. That her husband's elder brother, the

1824. defendant in the impending cause, succeeded his father in the zemindaree, of which, with other lands, the plaintiff claimed a third share. That the villages of Jug Soogun and others were included in the subject of that claim, while in reality they had been bought with her money, though in her husband's name. That therefore she prayed that those villages might be kept distinct from any portion which might be awarded to be the plaintiffs as their right.

Jugunnath
and others,
v. Rughoo-
nath Das.

The decree of the Zillah Judge, dated the 13th of August 1817, recited, that it appeared that from the time of Gunga Das, the original proprietor, the landed estate had never been divided, and that the eldest brother had by family custom always succeeded to the estate, the rest never receiving more than might suffice for their maintenance; that the allegation of the original plaintiff, that on the death of Junma Bhan their grandfather, he and Huree Kishen and Ram Narayun had lived in a joint state, and held the property in common possession, had not been established; that in fact, Ram Narayun and the plaintiff did not seem to have had, at any time, any connexion with the management of the zemindaree. That, on the contrary, from the case of Ukhnee Ral *versus* Umeeekaree, both of the parties in which were of the same family as the present litigants, it was evident that it had never been the practice among them to divide their talooks, on which ground the plaintiff had been cast by the former Judge of the zillah, whose decision had been upheld by the Provincial Court.

The plaintiffs claim was accordingly dismissed, and they were adjudged to pay all costs. The villages of Jug Soogun, &c. being found not to belong to the hereditary estate, were to remain as before.

The plaintiffs being dissatisfied with this decision, appealed to the Provincial Court, and the Acting Senior Judge deeming the decree of the Court below to be just and proper, affirmed it accordingly on the 26th of December 1820.

The appellants, dissatisfied with this decision also, prayed for permission to institute a special appeal in the Sudder Dewanny Adawlut, which petition was granted on the 26th of May 1821.

The proceedings and documents connected with the case, together with those relating to the former case, were called for and read on the 18th of February and 1st of March 1824. The following questions were then put to the *Vakeels* for the appellants; first, was the two and half ana share of the landed property which devolved on Nurhur, son of Mudhoosoodun, purchased by Mudhoosoodun and his elder brother Junma Bhan, or did it belong to the hereditary estate?

Answer.—It was property belonging to those two persons, by right of purchase; Nurhur never got any portion of the hereditary estate.

Question 2d.—Since it appears that neither Mudhoosoodun nor his son Nurhur were ever admitted to any participation in the zemindaree belonging to the Chowdhree, how can the conveying to them a right in lands not connected with that zemindaree, but recently bought, establish any claim to the partition demanded by the appellants.

Answer.—Mudhoosoodun Das did possess a right of the same kind as that claimed by our clients; but he took the two and half ana share referred to as an equivalent for it. 1824.

Question 3rd.—It is mentioned in the decree of the Zillah Judge, that besides Junma Bhan and Mudhoosoodun Das, Gunga Das had two or three other sons, what were their names? Jugunnath and others, v. Raghoo-nath Das.

Answer.—There were only these two sons of Gunga Das.

Question 4th.—If there was no other brother except these two, how did Mudhoosoodun come to be contented with a two and half ana share, when he had a right to a three ana, fifteen gunda share, or one moiety of the whole property?

Answer.—He accepted it on a compromise, being willing to avoid the expences and trouble of litigation.

Question 5th.—Were sixty-four beegas, more or less, ever set aside for the maintenance of Bruj Bulubh Das, the father of your clients; and are these lands appropriated to your clients now or not?

Answer.—There neither was nor is any exclusive provision of the kind.

This examination being concluded, it appeared to the Court (present C. Smith, Second Judge), first, that the former case which had been cited was not a parallel one to the one under consideration, and afforded no precedent for the decision of it; secondly, that time had involved the facts regarding the custom which obtained in the family previously to the time of Gunga Das in great obscurity; although, as far as could be ascertained, there was no sufficient evidence of the estate having been subjected to division; thirdly, that after the death of Gunga Das, certainly no such division was made, Mudhoosoodun Das, younger brother to Junma Bhan having obtained no share in the original zemindaree, but only part of some property which was in no way connected with it; his son, Nurhur, as well as Ram Narayun, second brother to Huree Kishen, who never pretended to have a right to such, and Bruj Bulubh Das, with Judhoo Bundun, younger brother of the respondent, being all equally excluded; fourthly, that the evidence of Jye Narayun and the other three witnesses was contradictory, and not corroborative of the appellants claims; fifthly, that the action instituted by Bruj Bulubh Das, father of the appellants, in the year 1201, *Umlee*, was not entered by him *in formâ pauperis*; that although the cause of his withdrawing that action was his inability to pay the fees required by regulation 38, 1795, he was not authorized by the 3d clause of the 10th section of that regulation to enter his suit again *in formâ pauperis*, but only on the payment of the prescribed fees, that therefore the present appeal was inadmissible; sixthly, that it appeared that before the date of the action on which the present appeal was grounded (20th of August 1807), Bruj Bulubh Das had sued three successive times, first in the year, 1179, *Umlee*, secondly, in the year 1182, and thirdly, in the year 1201; twenty-two years having thus elapsed between the first and third suits, and more than that from the date of the transactions which gave rise to them; that, in consequence, the third of these suits should, in conformity with the 14th section of regulation 3, 1793,

1824. have been dismissed, even had it not been contrary to the provisions contained in the 38th regulation of 1795, already referred to; seventhly, that although it did not appear that the present case came within the operation of regulation 10, 1800, yet it evidently could not be affected by the rules contained in regulation 11, 1793, because this last mentioned regulation came into effect from the 1st of July 1794, while Rughoonath Das, the respondent, had sole and undivided possession of the contested zemindaree for twenty years before that period; that should the respondent die without a will, his property might come within the operation of the said regulation, but not so as to benefit the appellants, since it would only entitle the younger sons of the respondent to a participation with their elder brother.

Jugunnath
and others,
v. Rughoonath Das.

The decree of the Provincial Court dated the 26th of December 1820, was accordingly affirmed, provision for the appellant's maintenance being at the same time declared to be incumbent on the respondent, and leave granted to the appellants, in case of any deficiency of such maintenance, to sue for its being secured to them.

1824.

ZEEBOO NISA and others, Appellants,

versus

PURSUM RAI and others, Respondents.

March 1st.

Claim to certain lands alleged to have been washed away by the stream from the plaintiff's estate, judgment given in favour of the defendants, to whose estate they had become gradually annexed without any proof of their allegation that those lands were formerly their property and had been re-

THIS was an action brought by the presents respondents in the City Court of Patna, on the 30th of July 1810, against Ghoolam Nujf (of whom Bhuttun, one of the present appellants, was heir) and others, to obtain possession of 58 beegas, 10 biswas of land situate in the Mouza of Jugdulub, Pergunna Kusmeer, in the Sarun district, the yearly produce of which was estimated at 117 rupees, and to procure the reversal of a decree which had been issued according to regulation 49, 1793, on the 16th of January 1806, in the case of Ghoolam Nujf *versus* Pursun Rai, involving the sum of 746 rupees, 8 anas, 3 pie, the whole amount of the suit being laid at 1,565 rupees, 8 anas, 3 pie.

The statement of the plaintiffs set forth, that the mouza of Jugdulub, containing four villages, was an estate on the south bank of the Ganges, the boundaries of which were defined in an accompanying plan: that that estate was the property of their (the plaintiffs') grandfather; its yearly payment to the Collector's office at Sarun being 2,274 rupees, 7 anas: that Ghoolam Nujf, commonly called Doma Chowdree, the defendant, plotting to get the estate into his own hands, by pretending it to have been land left dry by some deflection in the course of the river, brought several actions against the plaintiffs in the Criminal Court of Patna for forcible seizure of the crops: that taking advantage of an opportunity at which the plaintiffs being unable to procure bail for their personal appearance, were put in jail, he had established himself on the place in the month of Cheyt 1211, *Fuslee*:

that subsequently in 1212 *Fuslee*, Jugunnath Singh, *Tehsildar* of Dinapore, in pursuance of an order from the Collector of Behar, took the whole under the management of Government. But that eventually by his, the Collector's permission, the defendant and other proprietors of Fursedoonpoor and Daoodpoor, were admitted to a participation in the lands, as they happened to be contiguous to their respective estates. That Ghoolam Nujf sued the plaintiff for 1,000 rupees, as the yearly rent of 486 beegas for the year 1209 *Fuslee*, on the ground of their belonging to the properties of Danapoor Shuhzadpoor, under the provisions of regulation 49, 1793; that the plaintiffs also brought an action, in accordance with an order from the Circuit Judge, on a plea of ejectment from their rights. That the Acting Judge of the city, in conformity with his previous decree given in the Criminal Court, dismissed the claim of the plaintiffs, and adjudged of the defendant's claim 746 rupees, 8 anas, 3 pie, to be paid to him, leaving it at the option of the plaintiffs to bring forward a claim on the specific ground of right to the property, without adverting to any alleged circumstances of ejectment. That the plaintiffs then addressed a petition to the Board of Revenue containing a statement of the measurement of the lands which had been adjusted by the Collector, and professing their inability to give any thing in liquidation of the revenue still demanded from them as if they were in possession of all they had held before, and the lands as above mentioned had never belonged to them, but been gradually recovered from the stream. That the Board had ordered the Collectors of Behar and Sarun to investigate these statements, and on their being confirmed by such investigation, had directed the portion which had been retained under the management of Government to be returned to the plaintiffs with all the rents of it from the period of its occupation. That the Board had also directed the plaintiffs to sue the holders of the other portions. That the plaintiffs had according to those directions got possession of 408 beegas from the Collector. That those beegas were involved in the action brought by Ghoolam Nujf, and which was given in his favour as aforesaid on the 16th of January 1806. But that they were in fact part of the mouza of Jugdulub, and not in any way connected with the other two, as Ghoolam Nujf had pretended. That, lastly, since it had been proved that the lands in question had not been reclaimed from the river, but belonged of right to the plaintiffs, and as they heard that the summary decree of the 16th of January 1806 aforesaid, having been confirmed by the Provincial Court, had been returned to the Court in order that it might be carried into effect, they, in conformity with the orders they had received from the Board of Revenue, laid their suit for that share of the estate which had been given to Ghoolam Nujf, amounting as it first stated to 58 beegas, 10 biswas of land.

The plaintiffs subsequently, on the 28th of June 1813, filed a supplemental statement, to the effect, that the measures of the Board of Revenue had been approved by Government, and, in consequence of that approbation, that the plaintiffs had received from the Collector of Sarun the sum of 6,854 rupees, 10 anas,

1824.

covered by
the recessi-
on of the
river.

1824. the amount of the rents received from the share retained under Government management.

Zeeboo Nisa and others, v. Pursun Bai and others. In reply, Ghoolam Nujf, the first defendant, stated that the contested lands were part of his own property, situated in the mouza of Danapoor Shuhzadpoor on the south side of the Ganges. That the statement of the plaintiff declaring that they belonged to the mouza of Jugdulub, which was in reality on the north bank of the river in the district of Sarun, was a mere falsehood. That the practice of the City Courts regarding lands left dry by the river had always been that they should be attached to the estate on the side where they had been so left. That his (the defendant's) claim to the lands now in dispute had been established by various decrees, as that of the Court of Patna of January 16th, 1806, and 15th of November 1809, &c. and that since the right of the plaintiffs was thus evidently untenable, any claim, founded on that right, to the rents (which had been demanded for the period of five years) must of course be held to be equally unworthy of support.

Dost Ali, the second defendant, stated that the disputed lands belonged to the mouza of Danapoor Shuhzadpoor, and no other. That of that mouza one half belonged to Ghoolam Nujf, the first defendant, and the other had devolved on himself from his father. That he had sold one moiety of his share to Zeeboo Nisa, and had divided the other among various members of his own family, and that the plaintiffs had no interest in them whatsoever. The third defendant, Zeeboo Nisa, alleged, that she had bought a fourth part of the mouza of Danapoor Shuhzadpoor from Dost Ali, in which purchase a fourth part of the contested lands are involved, and that she had paid the Government rent for it ever since the time of the sale.

The case was decided on the 28th of July 1813, in the City Court, in favour of the plaintiffs, on the ground of the report of the Collectors of Sarun and Behar, and the consequent restitution made by the Board of Revenue; of the facts of the decree of the 16th of January 1806, having reference only to the rents of one year, its not declaring any right of permanent possession, and the plaintiffs being the persons from whom the Government revenues had been received.

Ghoolam Nujf, Dost Ali and Zeeboo Nisa being dissatisfied with this decision, appealed to the Provincial Court; by the Judges of which Court that decision was upheld on the 17th of July 1820. The same parties then entered a plea of special appeal in the Sudder Dewanny Adawlut, which was admitted on the 19th of April 1821.

The case came to a hearing before the Second Judge (C. Smith), on the 6th of January 1824, when along with the papers connected with the cause, the proceedings in the case of Ghoolam Rusool and others *versus* the present respondents, were filed on behalf of the appellants. It appeared to the Court that the claim of the appellants should be supported, inasmuch as it seemed evident that they had been proprietors of the mouza Danapoor Shuhzadpoor since the lands in question had been recovered from the river; while the estate of the respondents lay on the opposite shore.

That there were several cases in point in which the same parties were concerned, one in which Mr. Colebrooke, a Judge of the Patna Provincial Court (on the 22nd of May 1804), decided against the plaintiffs, because their property lay in the Sarun district. on the north bank of the river, while the disputed land was close to the south side, on which was the estate of the defendants, a foot deep nulla being all that remained between; another case, Joomarpooree *versus* Girdhur Lal and others, tried before the same judge, December 30, 1802, in which the land left dry appeared on the south bank of the river, the property of the defendants, while the Ganges, another stream, and an island belonging to the appellant, intervened between the lands claimed, and the zemindaree of the appellant, whose claim was therefore dismissed. The case cited by the respondents, it was observed, was not in point, relating, as it did, to a case of avulsion and to an island formed in the river, not to land gradually attached to either bank; and that, lastly, the proceedings of the City Court and Board of Revenue could not be held binding on the Sudder. It was therefore ordered that the City decree and that of the Provincial Court should be reversed, with costs and mesne profits payable by the respondents.

1824.

Zeeboo
Nisa and
others, v.
Parsan Rai
and others.

The opinion of the Second Judge being concurred in by the Officiating Judge (J. Ahmuty) on the 1st of March 1824; a final decision was passed accordingly (a).

SULEEM OOLLA and others, Appellants,

versus

DOORPUDEE DASEE, Respondent.

1824.

March 9th.

THIS was an action brought by the present respondent in the Zillah Court of Jessore, on the 28th of September 1812, to recover from Bulram Das, and Gudadhur, her deceased husband's brothers, and Suleem Oola and Tek Chunder, *Mahajuns*, a third share of certain landed property situated in the pergunna of Muhmood Shahee, the annual rent of which was stated at 501 rupees.

She alleged that one portion of the property claimed had devolved on her husband as his share of his father's property by the law of inheritance, and that the other portion had been purchased by him with his own money, and that on her husband's death she was legally entitled to the whole. That her right had not been disputed by her brothers-in-law, who had persuaded her to appoint them her agents, and had iniquitously inserted their own names instead of her's in the Collector's books; and in their own names had sold half of the property to Suleem Oolla in the year 1804, and the other half in 1809 to Tek Chunder.

One Judge of a Provincial Court being of opinion, that the Zillah decree should be reversed, a second that it should be affirmed, with leave, however, to the defendants to bring a fresh action, it is not competent to a Third Judge to dispose of the case finally by

(a) This decision is conformable to a variety of others passed in cases of disputed alluvial lands, and to the principles laid down in the recent enactments on that subject.

1824.

affirming
the Zillah
judgment,
if he differ
as to the
latter part
of the or-
der.

Suleem Oolla and Tek Chunder, the two *Mahajuns*, denied that the lands had ever belonged to the plaintiff's father-in-law or husband; and declared them to have been purchased by Bulram and Gudadhur who had sold them, as stated in the plaint, in the years 1804 and 1809, respectively, by a legal sale.

Bulram and Gudadhur in defence, alleged, that one portion of the property claimed belonged to the whole family by the plaintiff's own showing; that the other had been bought by the plaintiff's husband with the proceeds of the common stock, and that therefore the property belonged to the brothers of the deceased, for he had died childless, and his widow had no claim to any thing beyond maintenance.

The decree of the Zillah Judge was to the following effect: That it had appeared on investigation that the whole of the lands claimed in this case had been purchased in the life time of Ram Chunder, father-in-law of the plaintiff: that it was held by the *vyavastha* of the pundit, that the plaintiff should receive the third part of the whole as devolving on her in succession to her husband, brother of the other two heirs, and that therefore the deed of sale produced by Suleem Oolla and Tek Chund, *Mahajuns*, was null and void, as far as concerned her portion.

Suleem Oolla and Buggoo Chunder (who succeeded on his death to his father Tek Chund) being dissatisfied with this decision, appealed from it to the Provincial Court of Calcutta.

The Senior and Fourth Judges of that Court, before whom the cause came to a hearing on the 27th of June 1820, differed in their opinions; the Fourth Judge holding that the decree of the Zillah Judge should be reversed; the Senior Judge that it should be upheld, but leave granted to the original defendants to institute fresh suits, Bulram and Gudadhur separately, and the other two jointly for the recovery of any rights to which they might deem themselves entitled.

The Second Judge was of opinion, that the order of the Senior Judge, affirming the decree of the Court below, was correct and proper; but that the subsidiary order, declaratory of the appellants competency to institute a new action, should not be maintained. Under these circumstances he recorded a final order, affirming the Zillah Judge's decree, and dismissing the appeal with costs.

The parties, on this, petitioned for the admission of a special appeal to the Sudder Dewanny Adawlut, which was admitted.

The decree of the Second Judge (C. Smith), dated January 20th 1824, revited, that he coincided in all points with the view of the case taken by the Zillah Judge. That if the practice of the Courts had admitted of it, the case was of a nature to have been settled definitively by one Judge: but that the First, Second, and Fourth Judges of the Provincial Court had all differed in various particulars; that, therefore, the Second Judge, who had expressed his opinion last, should have sent his judgment to be confirmed by a Fourth, and that, without such confirmation, the final decree by that Court must be held to be informal and insufficient. That for these reasons his opinion was, that the decree of the Second Judge of the Provincial Court should be reversed as irregular, and that of

the Zillah Judge affirmed as being conformable to the law applicable to the case.

The cause came next to a hearing before the Officiating Judge (J. Ahmuty), on the 9th of March 1824, when the above judgment was confirmed in all respects, and a decree passed in favour of the respondent with costs.

UZEEZOO NISA, (Pauper,) Appellant,
versus
CULUB ALI KHAN, and others, Respondents.

1824.

March 25th

THIS was an action brought by the present appellant, in the City Court of Patna on the 9th of April 1814, against the present respondents and Moozuffur Hoosein Khan, commonly called Moohummud Hoor, to obtain possession of eight out of sixteen shares which had belonged to her husband Ahmud Ali Khan, (deceased), of Seidpoor Bursa, Salihpoor, and other *lakhiraj* mouzas, situated in the pergunna of Phoolwaree; the annual produce of which was valued at 2,500 rupees, with 467 rupees of the rents for the years 1219, and 1220 *Fuslee*.

On claim to certain lands in satisfaction of dower, there being no other assets, the Court will award possession of them to the widow, if they do not exceed in value her proper dower, or such as is proportionate to the rank and circumstances of her family, although no deed of dower may be forthcoming.

The plaintiff stated, that her husband had given the abovementioned sixteen shares, in common with others who had respectively given their portions of the mouzas Seidpoor Bursa, &c. in lease from 1213 to 1222, F. S., to a person commonly styled Moohummud Hoor; that that person had remained in possession of these lands till 1215, F. S., paying annually 75 rupees to Seyd Ali Khan, who had a something more than a two ana share in one of the mouzas aforesaid; 53 rupees to the plaintiff (being the sum allowed for her maintenance by her husband); and transmitting the rest to her husband, then residing at Lucknow; that Culub Ali Khan, the defendant, got the land from the beginning of the year 1215, F. S., and continued the above payments till 1218, when the plaintiff's husband died. That the sixteen shares which had belonged to him did not amount in value to the dower settled on her, and Mussumaut Mukhoo, the other wife of her husband; that, therefore, she had a right to eight of the above shares, as had the said Mukhoo to the remaining eight; that she possessed a document, given over to her for her satisfaction by her husband during his life time, made out by his father, and proving him to have been proprietor of the land; that Culub Ali Khan had in 1219, F. S., sent her (the plaintiff) only 33 rupees, and, conspiring with Mukhoo, her husband's other wife, had kept her out of her right, and retained the land in his own hands, having never since sent her more than 33 rupees *per annum*, that she made her claim, therefore, on the ground of her right to dower.

The defendant, Culub Ali Khan replied, that it was true that the lease granted to Moohummud Hoor was for the space of only nine years; but that two years after the date of the lease, he had given

1824. over the land to him, (the defendant,) receiving from him 401 rupees, in lieu of the profits for the remaining term. And that in 1218, F. S., Ahmud Ali, husband of the plaintiff, had granted his sixteen shares to him and his heirs on a perpetual lease at an annual rent of 401 rupees, 8 anas; that he had directed him, the defendant, to distribute that rent in the following proportions: first, 100 rupees to Fuqeer Ali and Uolad Ali; secondly, 53 rupees to the plaintiff, his first wife, and the residue to Fizzutoo Nisa and Saeedoo Nisa his second and third wives, and Qumroo Nisa his daughter, that he had uniformly conformed to these directions, beyond the sum appointed in which the plaintiff had no claim on the lands whatsoever.

Uzeezoo
Nisa, v.
Culub Ali
Khan, and
others.

Fizutoo Nisa, *alias* Mukhoo, another of the defendants, stated that she knew that her husband had, in the month of *Moohurram* 1226, *Hijree*, executed a lease as stated by the first defendant, and containing the conditions detailed by him. That according to those conditions the plaintiff had annually received 53 rupees, and Fuqeer Ali and Uolad Ali 100 rupees, as fixed by her husband and assented to in an agreement signed by herself, Saeedoo Nisa his third wife, and Qumroo Nisa his daughter; the heirs of Saeed Ali Khan, deceased, 77 rupees; and themselves, that is, herself (the third wife) and daughter aforesaid, the remainder; and that the right of the plaintiff in the land was confined to the allowance fixed at the above rate.

The defendant, Moozuffur Hoosein, commonly called Moohum-mud Hoor, confirmed the account given of the transaction by the above parties, stating him to have made over the land to Culub Ali Khan on the receipt of 401 rupees, and he disclaimed any subsequent connection with the affair.

The decree of the Register of the Court, bearing date the 22nd of September 1815, set forth, that the tenour of the case and evidence produced on the side of the plaintiff, shewed the deed of perpetual lease, produced by the defendant, Culub Ali Khan, to be informal and contrary to custom; that only one of the witnesses who had signed it seemed worthy of credit, one of them, for instance, Imamoo Deen Khan, having professed that he had been called by Ahmud Ali, a man whom he had never seen till that day, to make out and affix his seal to the document in question. That sufficient evidence also had not been adduced to substantiate the fact of the relationship which had been pretended between Ahmud Ali and the women Saeedoo Nisa and Qumroo Nisa, and that the plaintiff's claim therefore should be adjudged in her favour.

The defendants, Culub Ali and Fizzutoo Nisa, commonly called Mukhoo, dissatisfied with this decision, appealed to the Provincial Court of Patna.

Saeedoo Nisa and Qumroo Nisa filed a petition complaining of their claim of relationship having been disallowed in the City Court, although confirmed by the statements of the two first defendants in that Court, and the testimony of the witnesses, Futhoolla Khan and others, and praying for further investigation of that claim. Fuqeer Ali and Uolad Ali, also presented a petition, setting forth that they had conditionally purchased

four out of the sixteen shares possessed by Ahmud Ali, for 975 rupees; that they had received from Culub Ali annually 91 rupees; 7 anas, in lieu of the sum of 100 rupees, which was their due; that they were aware that in case of the decree of the City Court being affirmed or rescinded, still their interest in the land might not be affected; but they had deemed it advisable to give such a notice to the Court of their connection with the case.

1823.

Uzeezoo
Nisa, &
Culub Ali-
Khan and
others.

The decree of the Senior Judge of the Court, dated March the 16th, and of the Officiating Judge, dated April the 8th, 1819, recited, that the deed of perpetual lease said to have been granted by Ahmud Ali to Culub Ali was authenticated both by the evidence of witnesses and the contents of the *tumleek nama*, or deed of conveyance, made out in the name of Uzeezoo Nisa, the respondent, and others, by the said Ahmud Ali Khan. That the dower which had been claimed by the respondent had not been proved to be due. That as the women Saeedoo Nisa and Qumroo Nisa were, whatever the fact might be as to the validity of their pleas of relationship, actually in enjoyment of part of the sum claimed, the suit deserved to be dismissed on the face of it, since it was brought only against Culub Ali and Fizzutoo Nisa. That did the respondent think the disposal of the property made in the *tumleek nama* to be illegal it was in her option to bring an action on that specific ground against all four in actual possession; and that on these grounds the decree of the Register of the City Court of Patna should be reversed. The respondent entered a plea of special appeal in the Sudder Dewanny Adawlut, which was admitted on the 5th of May 1821. The case came on before the Second Judge (C. Smith) on the 7th, 13th, and 19th of January 1824, who gave judgment to the following effect: that the deed of perpetual lease which had been adduced bearing date the 14th of *Moohurram*, 1226, A. H., corresponding to the 1st of *Phagoon* 1218, F. S., and the 9th of February 1811, could not be held valid. For there seemed to be no substantial reason for its having been granted, nor any apparent benefit to be derived from it; and it could not be imagined that without the prospect of some advantage, whether of security or profit, any one would divest himself and his family for ever of all his possessions; that the evidence of almost all the witnesses who had appeared on the side of the respondents to prove that deed, as well as of the greater part of those whose signatures were affixed to it, was liable to suspicion, from many of them being bound to Culub Ali by the ties of relationship, or dependance; from others, as Imamoo Deen and Muhdee Ali Khan having never seen Ahmud Ali till the day when the instrument professes to have been executed; and from others, as Yoosuf Ali, elder brother of the said Muhdee Ali, being attached to the first respondent by friendship and community of religious opinions; that the said deed being thus undeserving of credit, the other two documents, the one providing for the disposition of the pretended unalterable rent, and the other relating to a conditional sale of four out of the sixteen shares, arising, as they did, from an assumption of the validity of that deed, could not be upheld. That no claim therefore could be advanced on the ground of any or all of these three

1824.

Uzeerzoo
Nisa, v.
Culub Ali
Khan and
others.

deeds; that it appeared also that the statements of Saeedoo Nisa and Qumroo Nisa that they were the wife and daughter of the deceased Ahmud Ali had not been confirmed; for there was strong circumstantial evidence to prove that the former was an obscure woman of Bengal, and had never been married, as she pretended; and her daughter's claim to a share of the inheritance must of course be held void in consequence; so that there were only two heirs to Ahmud Ali's property, the appellant and Fizzutoo Nisa. These possessed rights of two distinct kinds, one founded on their dower as wives, and the other, the general one of inheritance. With regard to the first, the appellant was entitled to a sum for her dower, proportionate to her rank in life (and it was matter of notoriety that the dower of women in opulent circumstances in Behar was never less than 40,000 rupees) although the deed executed in her favour could not be found. And to this, in the present case, even had the above sum not exceeded the value of the eight shares, half of all the property left by Ahmud Ali, the appellant's claim as an heir was to be superadded: that on these grounds she must be considered as the legal proprietor of these eight shares, and as being free to dispose of them at will from the expiration of the lease (in 1222, F. S.) made in 1213, F. S. by Ahmud Ali to Moohummud Hoor, and in 1215, F. S. transferred by the latter to Culub Ali; and that, therefore, the decree of the Provincial Court of Patna should be reversed, and that of the City Court upheld.

The case came on a second time before the Officiating Judge (J. Ahmuty) on the 8th of March, 1824. His decree recited, that the deed of perpetual lease bearing date the 14th, and the *tumleek nama* of the 18th *Moohurrun*, 1226, *Hijree*, appeared to be placed beyond doubt by the attestations of all the witnesses; the former document more especially by the evidence of two persons, Yoosuf Ali and Muhdee Ali. That as to the latter, although the testimony of Imamoo Deen was open to suspicion, on the ground of that person having not even seen Ahmud Ali till the date of the instrument, still that suspicion could not affect the credit due to the other witnesses who had signed it. That it should be observed, that all of the three respondents, Fizzutoo Nisa, Saeedoo Nisa, and Qumroo Nisa, had admitted the validity of these documents; that such a perpetual lease was not contrary to any regulation of Government, as the decree of the City Court of Patna implied; that with regard to the plea of the appellant, that the eight shares in question were included in her dower, no mention had been made of the amount of that dower at all, except incidentally in the appellant's reply to the plea of the present respondents, a mention not sufficient to establish the point; and that on these grounds the decree of the Provincial Court of Patna should be affirmed.

The case was brought to a final hearing on the 25th of March 1824, before the Third Judge of the Court (J. Shakespear), when it appearing to him that the appellant had a right to her proper or proportionate dower; that her husband had left no property or efforts of any kind, except the sixteen shares in the *mouzas* detailed in the plaint; and that the right of the first respondent to

these mouzas on a perpetual lease, with the authenticity of the two documents, the *tumleek numa*, and deed of conditional sale to Fugeer Ali and Uolad Ali, had not been supported by sufficient evidence; it was ordered that the decision of the Provincial Court should be reversed, that of the City Court affirmed, and that the appellant should obtain possession of the eight shares claimed by her.

1824.

Uzeezoo
Nisa, v.
Culub Ali.
Khan and
others.

BHUGWUNT SING (Pauper), Appellant,

1824.

versus

THE COLLECTOR OF GORUCKPORE, GOPAL BUKSH, and RAJAH OBHEY SINGH, Respondents. March 30th.

THIS was an action brought by the appellant, *in forma pauperis*, against the Collector, on the 30th of April 1814, in the Zillah Court, to invalidate the public sale of talook Shunkerpoor, pergunna Amareh. The annual *jumma* was stated at 2,378 rupees. The plaintiff, after premising that the talook was his ancestral property, alleged, that by reason of the heaviness of the assessment, and a fall of hail in the year 1218, F. S., he incurred a balance of three hundred and sixty rupees; and that being placed under the charge of the *peons* who served him with the demand, he went home and raised the money, but received intelligence of his estate having been brought to sale, as he was on the road to Goruckpoor in company with the *peons*, and no attention was paid to his subsequent remonstrances; that he grounded the present suit on the Collector not having withdrawn the *peons* from his person, nor fixed up any notice at his house, as required by the regulations, and also, on the fact that the property (which he estimated at 20,000 rupees), was sold for the inadequate sum of 310 rupees, and purchased by one Gopal Buksh, a relation of the pergunna *Canoongoe*. The Collector answered, that the plaintiff having entered into an engagement for the public revenue from the year 1216, to the end of 1219, F. S., his talook was disposed of by public sale on account of arrears incurred in 1218, F. S., on the 1st of October 1811, pursuant to notices issued on the 11th of July preceding; that the purchaser Gopal Buksh was proprietor of several other estates, and that the sale was accordingly approved of by his superiors; lastly, that, as the plaintiff did not offer any objection during the period of more than two months which elapsed between the notice and the sale, he was not now entitled to any attention. It was replied by the plaintiff, that he never had any knowledge of the notice having been issued, and that it had certainly never been affixed as usual at the door of his residence; that the Collector should produce his receipt if the notice had been actually served; that it was the practice to withdraw all process against the person when the estate of a proprietor was put up for sale, while, in the present instance, a *peon* had charge of him for the purpose of realizing the balance till his arrival at the office; that Gopal Buksh was brother to the public *Canoongoe*, Public sale by auction of a defaulter's lands set aside on the ground that notice of the intended sale was not published on the estate.

1824.

Bhogwant
Singh, v.
The Collec-
tor of Go-
ruckpore,
Gopal
Buksh, and
Rajah
Obhey
Singh.

(Cheytun Bukah) and that the sale was effected by the collusion of the Collector's officers. The Collector rejoined, that three notices of sale were issued at the Sudder station and in the interior, and that a receipt was not required by the regulations.

On the 27th of August 1817, the Zillah Judge dismissed the plaintiff's claim, as he acknowledged the arrear, and as his objections against the sale in other respects were not considered valid under the regulations. Costs were directed to be levied by the sale of any property of the plaintiff which might be hereafter forthcoming.

On appeal to the Benares Provincial Court, Gopal Buksh, and Rajah Obhey Singh (to whom the former had sold his interest) having been admitted as respondents, gave in an answer defending the legality of the sale on the same grounds as those urged by the Collector.

On the 21st of February 1820, the Fourth Judge affirmed the decree of the Zillah Court; and a petition for a special appeal having been preferred to this Court, the Chief and Fourth Judges (W. Leycester and W. Dorin) before whom the cause first came to a hearing, recorded their concurrent opinion that the decision of it depended upon the question as to whether any notice had been set up within the precincts of the estate as required by section 5, regulation 26, 1803. The depositions of three witnesses, adduced on behalf of the respondents to establish this point, were therefore ordered to be taken by the Zillah Judge, and a requisition was addressed to the Provincial Court for a missing statement, which had been given in by the Collector, asserting that a notice had been fixed up on the door of the defaulter's house, or, in case of that paper being lost, for the documents in the Collector's office on which it was grounded. The Second Judge (C. Smith), who next took up this case (on the 10th of February 1824), agreed in considering that it came under the above regulation, which he noticed had been his reason for recording, on the 12th of August 1820, that a special appeal should be admitted. Mr Smith was of opinion that the Collector's pleadings in the Zillah and Provincial Court were tantamount to an acknowledgment that no notice was served at the appellant's house, as the former had avoided giving a direct answer to the plaintiff's express denial; and when called upon by him to produce his receipt for the notice, again evaded the question in the following words, "previous to sale a public notice was fixed up at the Zillah Court-house, at the office of the Collector, and at that of the pergunna *tehsildar*, and the three notices were accordingly issued when the plaintiff's estate was sold;" plainly shewing that he was not in the habit of sending a notice to the spot, and had not done so in the present instance; and as his answer in the Provincial Court was to nearly the same purport, neither that paper nor the rejoinder containing any mention of a notice having been sent to mouza Shunkerpoor. It further appearing, that the Acting Collector, when called upon afterwards by that Court, declined furnishing a full account, stating that it had already been done, from which it was evident that no fourth notice had then been recorded, as issued, on the records of his office, nor even thought of; no credit was attached

to the subsequent statement, that a fourth notice had been affixed at the plaintiff's house. There was reason to believe that Rājah Obhey Singh, on learning the grounds on which a special appeal was admitted, had induced four of his cultivators by undue means, to attend at the *tehsildar's* office, and relate a made up story of a notice having been fixed up at the plaintiff's door, and of his having given a receipt, as three of them, when afterwards examined on oath by the Zillah Judge, utterly denied all knowledge of any such notice, and stated that they told the above story at the *tehsildar's* under intimidation, and by the Rajah's orders; and the above conclusion was corroborated by the joint answer of Obhey Singh and the other defendant in the Provincial Court, which maintained that the regulations did not direct any notice to be served at a defaulter's house. In fine, the Second Judge pronounced the case to be one of extreme hardship on the plaintiff, caused by the negligence of an officer of Government, as it was obvious that the estate had been undersold, and the purchaser, Gopal Buksh, had virtually acknowledged his being a relation of the *Canoongoe*, by his studied silence on that point, and yet the Collector had transmitted a report to the Board, in which this person was simply styled a landholder, instead of being designated as belonging to the *Canoongoe's* family. Had the real state of the fact been represented to the Board (the Second Judge observed) they would have undoubtedly disallowed the sale. He therefore strongly urged the propriety of reversing the decrees of the lower Courts, and annulling the sale as illegal under the regulation before mentioned. The Officiating Judge (J. Ahmuty) finding on an attentive consideration of regulation 11, 1822 (a), that none of its provisions affected the present case, concurred in the above opinion. It was therefore ordered that the plaintiff should be reinstated in his estate on payment of the original arrear, and costs of suit were made payable by Government; Gopal Buksh and Rajah Obhey Singh being adjudged to pay their own expences, and the plaintiff being left at liberty to sue them for mesne profits.

1824.

Bhugwant
Sing, v.
The Collec-
tor of Go-
ruckpore,
Gopal
Buksh, and,
Rajah
Obhey
Singh.

(a) The third clause of section 7, regulation 11, 1822, requires that notice of an intended sale shall be sent by a single peon, to be published on the estate or in the *moofussil* in the manner therein pointed out, and the 4th clause goes on to state, that "No sale shall be liable to be annulled on the ground of any insufficiency of the notice given, *provided it be satisfactorily proved* that the copy of the notice required to be sent to the Court for publication was received by the Judge, or other person in charge of the Adawlut, for a period of thirty days prior to the date of sale; and *provided there be sufficient evidence that the notice directed to be sent into the moofussil was received by the parties, or by any manager or agent on their part, or was published at a public Cutchery after the manner provided, on a date prior to that on which the sale may have taken place, by not less than twenty days; or provided it be satisfactorily proved by other circumstances, or there be sufficient ground to presume that the defaulter was fully aware of the demand being outstanding against the mehal, and of the intended sale, for a like period before the day of sale.*" In the present instance, the required formality was not observed, nor was there reason to suppose that the defaulter was aware of the demand for the prescribed period.

1824.

April 5th.

BHUGGO SING, Appellant,

versus

DOONDA SING, Respondent.

Claim to recover a debt on bond rejected, it appearing that the stamped paper on which the bond was executed in the year 1813, was of the kind prescribed for use by regulation 6, 1797, which had been altered by order of the Board of Revenue, in 1801.

THE respondent brought this suit against the present appellant on the 22d of March 1819, in the City Court of Patna, for the recovery of 2,000 rupees principal, and 1,325 rupees interest, at the rate of twelve *per cent per annum*, the whole amounting to 3,325 rupees. It was stated in the plaint, that Baboo Boghooree Sing divided his entire property into sixteen parts, and gave eleven of them to the plaintiff and five to the defendant; that some time after this transaction the said Baboo, and subsequently his wife, died; that on this the plaintiff borrowed the sum of 6,400 rupees to perform for the deceased the usual exequial ceremonies; and that the defendant having balanced the account of expences for the above ceremonies, and not having money to pay his share, executed a bond engaging to pay the plaintiff with interest the sum of 2,000 rupees, as his proportion of the charge.

The reply of the defendant contradicted generally the above statement, and proceeded to deny the expenditure of the above-mentioned sum (6,400 rupees) for the exequial ceremonies of Bughooree Sing and his wife; also the executing of a bond in favour the plaintiff; the making out any accounts whatever with him, and, in short, every thing stated in the plaint.

On the 11th of November 1819, the Acting Judge recorded his opinion, that from the testimony of the four witnesses to the bond, especially that of the actual drawer up of it, no doubt could be entertained as to its having been the voluntary act and deed of the defendant, and that his denial of its authenticity was not worthy of consideration. Looking therefore on the defendant as debtor to the plaintiff in the amount specified in the bond, with the interest thereon, it was ordered that the sum of 3,325 rupees principal and interest, together with costs, should be paid by the defendant.

The defendant appealed from this decision to the Court of Appeal at Patna, and on the 29th of November 1820, that Court affirmed the decree, dismissed the appeal, and rendered the appellant liable for the whole costs of suit.

The appellant then petitioned for a special appeal to the Sudder Dewanny Adawlut, which was admitted, the bond on which the debt was claimed appearing to have been drawn up on paper not bearing the prescribed stamp. A memorandum to the following effect, with the signature of the Superintendant of Stamps was filed by the appellant, " Papers were stamped at the two upper corners from the commencement of the stamp office bearing the 9th of June 1797, one thousand seven hundred and ninety seven "

" Papers stamped in the middle of the paper above and below, instead of at the two upper corners previously in practice, ordered by the Board of Revenue on the 22d of September 1801, one thousand eight hundred and one." The respondent insisted on the authenticity and validity of the bond. The stamped paper was

purchased, he stated, long before the bond was executed, and independently altogether of the written instrument, there existed ofal evidence to prove the debt. That such evidence might be received on failure of documentary proof he contended was indubitable and had been established by the Court of Sudder Dewanny Adawlut on a reference from the Acting Judge of Zillah Cawnpore. A copy of this document he filed and it was in the following terms :

1824.

Bhugoo
Sing, v.
Doonda
Sing.

“ A shroff residing at Cawnpore, who had a regularly constituted agent settled at Lucknow, having been formerly in the habit of executing *hoondees* on plain paper when the amount was receivable at that place, where of course no stamps were used, now refuses to satisfy the demands made upon him by individuals who have paid for such bills, on account of their not being drawn up as required by section 11, regulation 1, 1814, on paper bearing the prescribed stamp.

The agent, it must be observed, has long since absconded from Lucknow, although the principal is still at Cawnpore.

Should the amount received by the latter, in exchange for *hoondees* on the former, prove to be irrecoverable, on the plea above noticed, the injury sustained will be very extensively felt.

Although, under a rigid construction of the regulation, a suit resting on a document of the description in question seems to be inadmissible, yet, as the case appears to be attended with a circumstance sufficient to form an exception from the rule, that of the amount being receivable in a foreign country, and as the rejection of the applications that have been made would be productive of considerable hardship, I consider it proper, before proceeding any further, to submit the question for the consideration of the Superior Court.

The reply was as follows :

The case submitted by you appears to be, that A., a shroff at Cawnpore, draws bills on unstamped paper on B., his agent or correspondent at Lucknow, and B. having absconded, A. refuses to satisfy the holders of the bills, pleading that the bills, as not being drawn on paper having the stamp required by regulation 1, 1814, are of no avail.

The Court observe, that the drawee not being forthcoming, the holder of bills has his remedy in virtue of them, as a matter of course against the drawer, supposing them duly stamped. But the bills in question being on plain paper, there seems no mode of avoiding the penalty of the stamp regulation, except by procuring a stamp to be affixed to them by payment of ten times the duty, under the provisions of the 9th section of the regulation quoted, supposing sixty days not to have elapsed since the date of the bills. The penalty, however, of the stamp regulation, in the case of a bill being drawn on unstamped paper, and no stamp being any longer procurable to it, is no more than this, namely, that the bill on plain paper cannot be admitted in evidence by the Civil Courts. But the transaction between the parties is not invalidated or affected ; and if other proof can be brought by the bill holder to the fact of the shroff having received the consideration for it, the amount is still recoverable, like any other debt. It is clear, however, that the bill being no longer evidence, the proof of the

1824. transaction is rendered more difficult, and in some cases perhaps impracticable.

Rhugoo
Sing, v.
Doonda,
Sing.

In the cases to which you allude, the parties who hold the bills must take the consequence of their want of caution, or of their committance at evasion of the stamp duty, in not having seen that the proper stamp was used, according as either shall appear imputable.

The circumstance mentioned in the last paragraph of your letter does not appear material; inasmuch as bills drawn at Cawnpore on Lucknow cannot be considered exclusively payable at the latter place, for supposing them dishonoured at Lucknow, there always remains the final recourse against the drawer at Cawnpore. And no reason appears why the stamp should not be used on such bills. Though the stamp might be useless at Lucknow, it would not be so at Cawnpore, where the bills are always liable to be returned; and where the regulation requires that bills should not be written except on stamps.

If there was premeditated fraud in these cases on the part of the shroff who drew the bills on plain paper, it may be a matter of regret that the regulation prescribes no fine or pecuniary penalty for his evasion of the stamp duty, and that the only penalty, viz. the loss of the bill as evidence, falls not on him, but on others."

The case came to a hearing before the Second Judge (C. Smith) on the 16th and 17th of February 1824. After examination of all the papers connected with the suit in the City Court, the Court of Appeal, and those filed in the Sudder Dewanny Adawlut, also a proceeding of this Court in the case of Meetingjah Rai and others, appellants, *versus* Joogul Kishen, respondent, the letter from the Acting Judge of Cawnpore to the Register of this Court, dated the 11th of June 1819, and the answer to it, dated the 25th of June 1819, filed by the *vakeels* of the respondent, with the English memorandum signed by the Acting Superintendent of Stamps, dated the 9th of March 1821, and a copy of the stamp sold, filed by the *vakeels* of the appellant, he recorded his opinion, that as it appeared from the contents of the document signed by the Superintendent of Stamps, that on the 22nd of September 1801, the stamp which was sealed or stamped at the top and bottom, came into use and superseded that which had the stamp at the two corners, by order of the Board of Revenue, the stamp upon the bond dated the 4th of September 1813, filed by the respondent, was not according to the legal mode of stamping. Further, the evidence of the stamp-seller, Bijnath Mookerjee, whose name appeared on the bond, by no means established the fact of its having been sold at all, nor was the seal of Mooftee Museeh Oollah upon the said bond, at all clearly supported by evidence: for the witnesses of the respondent had stated nothing but upon hearsay: moreover, it appeared that two of the said witnesses were servants of the respondent, and there was not much credit to be attached to the evidence of the other two, one of whom was a *Mahtoon* and the other a common *Peon*; whereas it was customary in executing a bond for any large sum to have respectable witnesses to it. Further, it was not proved by any means that the respondent had

borrowed the sum mentioned, and spent it in performing the *Sraddh* or exequial ceremonies of the deceased. The appellant had accounted for his obtaining the money spent in the ceremonies another way, but in neither of the Courts below had witnesses been admitted in support of his assertion. Again, if the 2,000 rupees had been owing, still it appeared to the Second Judge that the appellant would not willingly have acknowledged the debt, nor have voluntarily executed a bond for the payment of the sum. It was to be remembered that Doonda Sing had, at no very distant period, brought a false action into Court, as might be seen on reference to the case No. 230. These circumstances, therefore, considered, since the justice of the respondent's claim could by no means be admitted, the Second Judge thought it was fit to reverse the decrees of the Courts below, and dismiss the suit of the respondent with costs in all three Courts.

On being sent for confirmation to a Second Judge (J. Ahmuty), and the state of the law respecting stamps being enquired into, it appeared to him that the execution of the bond in question was not in accordance with sections 2 and 12, of Regulation 7, 1800. Besides, it was seen by a communication from the Superintendent of Stamps, dated in 1821, that the bond was not executed according to the rules prescribed by the Board of Revenue; nay, in that very year (1800) a new method of stamping was introduced, and though the bond in question was dated twelve years subsequent to this change, yet it was not drawn out in accordance with it; therefore, admitting it to have been actually the deed of the parties, it was not a legal instrument. The decrees of the Courts below were therefore reversed with costs (a).

(a) It may be here observed (although in the opinion of one of the Judges of the Sudder Dewanny Adawlut no allusion was made to the circumstance) that the decision of the superior Court might have been different had the debt been clearly proved to have been due. The informality of the instrument had doubtless great weight in influencing the ultimate decree, but the Second Judge rested his opinion, as will have been observed, mainly on the facts of the case as they appeared in evidence, and was guided at least as much by equitable as by strictly legal and technical considerations.

1824.

Bhugoo
Sing, v.
Doonda
Sing.

1824.

CHOWDHREE DOOD RAJ SINGH, Appellant,
versus

MOOMUMMUD YAHIA KHAN, Respondent.

April 12th.

A *Mokurrere* lease of lands in Zillah Behar continued to the heir of the grantee, the successor of the grantor not proving that it was a life grant only.

THE appellant, Chowdhree Dood Raj, instituted a suit against Moohummud Yahia, on the 20th of February 1817, in the Dewanny Court of Zillah Behar, to recover possession of a certain mouza in the pergunna of Amurthoo, the *jumma* of which was 303 rupees; also to recover the sum of 992 rupees, the profits derived from the said property for the time between the years 1213 and 1223 *Fuslee*; altogether amounting to 1,295 rupees.

In this suit the plaintiff set forth, that the whole pergunna above mentioned was the property of the defendant, and that in the year 1197, F. S., he received from Bheekhum Singh (whose heir the plaintiff is), an engagement in writing for the mouza in question, at a yearly *jumma* of 303 rupees, and continued the agreement to his children after him, by deed delivered to the said Bheekhum, according to which agreement, and in full confidence therein, the grantee laid out much money on improvements and cultivation of the said mouza, and regularly paid the rents to the proprietor; that on the death of Bheekhum in 1213, F. S., the plaintiff took possession of the property, and retained it up to the middle of the same year; but that, in the commencement of the ensuing year, the defendant, seizing on the mouza by force, ousted the plaintiff therefrom, and laid the foundation of the present action.

The defendant, in reply, stated that from the year 1190, in which year the property accrued to him, up to the year 1200, it, together with the title deeds connected with it, remained in charge of Nawab Ali Ibrahim Khan, the uncle of the defendant, he being under age, and the pergunna of Amurthoo was let in farm to Deo Narain Rai, father of the plaintiff, under the name of Ajeet Sing, for the period between 1192 and 1200, F. S., that after the death of the Nawab, the custody of the estate came into the hands of his two sons, and in the year 1202, it came into the hands of the defendant, till when the defendant had no controul over the property; that it was therefore impossible that he, in the year 1197, could have executed the deed in favour of Bheekhum, as stated by the plaintiff; that in the year 1201, after the expiration of the term for which Deo Narain had taken the land, and the death of the Nawab, his two sons above mentioned, forming the design of gaining possession of the estate to the prejudice of the defendant, they (the defendant being in possession) instituted a suit against him for the right to this mouza, and that Bheekhum Singh joining them, stated to the defendant that he had received a *mokurrere* grant from the Nawab; that the defendant accordingly demanded the deed from them: and they gave a written promise to bring the deed or deeds in two months from the date of the promise, namely, the 11th of *Sawun* 1202; but that Bheekhum Sing having no such deed to present, never fulfilled the promise, and after his death, in the year 1213, the plaintiff was towards the defendant, in every respect, as the other Ryots

and cultivators of the estate; that if the defendant had ousted the plaintiff, as was stated, he would not have remained silent from 1213 till 1224, being nearly 12 years; that besides, in the *sunnud* of the defendant, the words "to his children" were not to be found; and, lastly, that the plaintiff had stated himself to be the heir of Bheekhum Singh, but that there was no truth in the assertion. On the 6th of January 1818, the Acting Judge of the Zillah expressed his opinion that no sufficient reason had been assigned by the plaintiff for his long silence on the subject (11 years and 11 months), nor was the *mokurreree* grant said to have been executed in favour of Bheekhum Singh, or the possession of the property by the plaintiff, by any means proved; but that, on the contrary, the possession of the mouza in dispute by the defendant, without hindrance from any one, after the death of Bheekhum, and his being still possessed of the land, was clear. On these grounds the plaint was dismissed, and the costs made payable by the plaintiff.

1824.

Chowdhree
Dood Raj
Singh, v.
Moolum-
mud Yabie
Khan.

The plaintiff from this decision appealed to the Provincial Court of Patna, where the above decree was affirmed with costs.

From that Court the appellant petitioned for a special appeal to the Sudder Dewanny Adawlut, which was granted.

The case was tried originally by the Second Judge (C. Smith), to whom it appeared, on examination of all the evidence adduced, that the proofs in the present case were the same with those of two other cases which had been decided by the Court.

The evidence of Meer Ahmud Hoosein Nazir, and that of two of the five witnesses to the engagement, dated *Sawun* 1202, *Fuslee*, of whom three were dead, was gone into, together with that of others. The Second Judge did not consider the alleged engagement entitled to any credit, because if such had been executed by Bheekhum Singh, why did not the respondent, on the non-performance of its condition, namely, to produce his title deed within two months, instantly oust the said Bheekhum: again, since the *kuboolent*, or engagement, must be in the hands of the respondent, if in that grant any thing was mentioned concerning "the life time of Bheekhum Singh," why had not the corresponding engagement been produced in confirmation of this statement? Besides, from the state of the present case, and that of others connected with the claims of the respondent to the pergunna in question, it was clear that these kinds of grants were frequently executed by the respondent; probably from a regard to his own interest, as tending to ensure the better cultivation of the estate; and it was easy to suppose that this grant to Bheekhum Singh and his children was executed with the same object. Setting, however, supposition aside, the evidence brought by the appellant went to prove the fact, and to disprove, besides, what had been stated by the respondent, relative to his being under age at the date of the grant. Moreover, the decision of this Court, in the case where the present respondent was appellant, and Sham Deo and others were respondents, was enough to settle the point of the controul possessed by the respondent over his affairs at the time. For it was proved in that case, that in the year 1193, F. S., the respondent had assigned a certain mouza of the pergunna Amurthoo to Shah

1824. Ahmud Hoosein in perpetual *mokurreree* tenure; Prem Deo Rai, father of Sham Deo Rai, having bought from the above grantees the said *mokurreree*; and that if, therefore, a *sunnud* by the respondent, dated in 1193, had been acknowledged by this Court, it must also recognize as valid one dated in 1197.

Chowdbree
Dood Raj
Singh, &
Moobum-
mud Yahi-
Khan.

Again, the respondent had compared the present case with a former one. It did not appear on examination of the case referred to, that any similitude existed, since in the decree of the Court of Appeal of Patna in that case (which was afterwards confirmed by the Sudder Dewanny Adawlut), it was clearly stated, that the grant in favour of Amjud Ali was for his life time only, and the continuance of the *mokurreree* claimed in that case was not allowed by the Court. On these grounds, the Second Judge recorded his opinion, that the two decrees of the Courts below should be reversed, and a decree passed in favour of the appellant, the costs of all three Courts being charged to the respondent. It was further provided, that the appellant, on obtaining possession of the estate from 1223, *Fuslee*, should pay rent to the respondent (55 rupees yearly) during his life, and should receive from him 1,016 rupees, 12 anas, on account of the profits on the land from 1213 to 1223; and that from that time up to the time of his gaining possession, whatever profits should be received from the estate he might recover by a separate action. The Officiating Judge (J. Ahmuty) concurring in this opinion, a final decree was passed accordingly (a).

(a) The pergunna of Amurthoo in Zillah Behar was one of those places for which a special arrangement was made antecedently to the decennial settlement by Mr. Thomas Law. Mr. Harington, in a note to his *Analysis of the Regulations*, vol. 2, page 249, observes that "certain *mokurreree* or permanent farms, which had been granted by the former government of the country, or by the British Government before the period of the decennial settlement, and which by the rules for that settlement were to be continued in force during the lives of the lessees, are also included in the *jumma* of the farmed districts. Two *mokurreree* farms of this description in the district of Behar, viz. Tilharah, farmed to Meer Mohumud Bakir Khan, and *Rajgeer Amurthoo*, farmed to Mohummud Yahi Khan, are assessed, after deduction for the *jageer* abolished, the former at 72,563 rupees, 9 anas, the latter at 26,002 rupees. The same district comprises other *mokurreree* farms to a still larger amount, which were constituted in the year 1788, or *Fuslee* year 1196, the year preceding the decennial settlement of the residue of the Behar Province; and which it is material to remark are excepted from some of the general rules for that settlement; particularly that which declared *mokurreree* leases to persons not the actual proprietors of the land included in such leases, though granted or confirmed by the Supreme Government, to be for the lives of the lessees only."

SEAM BEGUM, and others, Appellants,

1824.

versus

GHALIB JUNG KHAN, and others, Respondents.

April 13th.

THIS was a suit brought in *forma pauperis* by the respondents, on the 5th of July 1819, in the Court of Appeal for the Bareilly division, against the appellants, to enforce the division of the property of the late Moohummud Azeem Khan (of whom the plaintiffs claimed as heirs) into ninety-two parts, and to recover forty-nine parts of the same. The property was stated to consist chiefly of houses, gardens, jewels, furniture, and ready money; the whole valued at 14,700 rupees, as specified in the plaint.

The plaint set forth, that the property above mentioned was accumulated by the deceased Nawab, of whom both parties were heirs at law. The said Nawab, it was stated, died on the 13th Zeehij, 1228, A. H., leaving as heirs Mussumnaut Seam Begum (a defendant) his first wife, Hidayut Oollah Khan, his son (father of Naimut Oollah), Roshun Ara Begum and Ujeeb Begum, daughters of Seam Begum (defendants); also the plaintiffs and their sisters, born of Shaum Beebee (deceased), who was second wife of the deceased Nawab, and Badshah Begum, third wife of the same.

According to the law of inheritance, the property above specified being divided into ninety-two shares, and forty-three being subtracted as the proper shares of the defendants, forty-nine remained as due to the plaintiffs. But the defendants had not made any division as above, but had taken illegal possession of the whole.

The defendants stated in answer, that the above allegation was unfounded. In the first place, that Mubarick Begum brought an action against the defendants for the recovery of a share of the property now sued for, and the suit was dismissed by the Register who tried it, and that dismissal was confirmed by the Judge of the same Court; that the case was now pending, having been brought by special appeal into the Provincial Court of Appeal.

Secondly, as the plaintiffs had failed previously in a suit they brought for the same property, the suit being dismissed by the Register and the Judge, and a special appeal not having been granted, they could not, according to the provisions of section 10, regulation 2, 1803, bring the same action again into Court. This action had been stated as resting upon the law of inheritance, but by the authority of that law, as delivered by the Mooftee in one of the previous suits, no part of the property in dispute could belong to the plaintiffs: besides, supposing that the plaintiffs had, as they stated, a claim to the property, the jointure or settlement of Seam Begum, one of the defendants, amounting to three lacks of rupees, absorbed the whole of the property left by the deceased. The Nawab had, it was stated, during his life, made over to the said Seam Begum the whole property instead of her settlement of three lacks of rupees. It was clear, therefore, that not one of the heirs of the deceased had a claim to any part of the estate, and, in point of fact, not one of them had a claim to possession of any part of it.

A suit founded on a claim of inheritance having been dismissed, it is not competent to the Courts to entertain another action by the same individual on the same grounds; though the persons sued, and the amount claimed be different.

1824.

Seam Begum and others, v. Ghalib Jung Khan and others.

On trial in the above Court, the first Judge took the opinion of his law officers, who delivered their *futwa* that the plaintiffs had no title, from the 11th of *Rubeoosanee* 1215, A. H. the date of the deed of *hiba-bil-iwnz*, or gift for a consideration executed by the deceased Nawab in favour of Seam Begum, in lieu of her dower, to any share in property accumulated before that time, but that they might share, agreeably to the law of inheritance, in property acquired since that date.

The Court, on this opinion, having ascertained what property had been acquired subsequent to the deed above mentioned, directed the division of the same into ninety-six shares, of which forty-nine were adjudged to the plaintiffs.

From this decision the defendants appealed to the Sudder Dewanny Adawlut, laying the appeal at 5,234 rupees, 13 anas, 4 pie, the value of the property adjudged by the Court below to the other party.

On the 23d of November 1822, when the case came on, the respondents being absent, though they had received a summons to attend, the trial was ordered to proceed *ex parte*.

The case was accordingly brought before the Second Judge of this Court (C. Smith), on the 6th and 7th of January 1824, in the absence of the respondents. He declared his opinion that the suit had been erroneously entertained, as the respondents had been cast in a suit resting on the same ground, and to the same effect as the present, brought against one Niamut Oollah, both in the Court of the Register and the Judge, and their petition to the Provincial Court for the admission of a special appeal had been disallowed.

The substance of the reasons given by the Register for his decree in the case adverted to was, that the deceased Moohummud Azeem was not legally married to Shaum Begum, the mother of the plaintiffs, through whom they claimed to inherit.

The Judge's decree recited that the mother of the claimants was a hired slave, and that it appeared from the authority of the law officers, that the children of such a woman were not entitled to inherit her master's property, the circumstance of slavery being a bar to inheritance: and the offspring of a concubine (she being a hired slave) were also slaves, and the property of the master of their mother. The mother of the claimants, the Judge observed, even supposing her to have been a slave in the legal acceptance of the term, could not have been married to their father, inasmuch as it was illegal, according to the Moosulmaun law, for a man to marry a slave, he having at the time a free wife living; since then the respondents had been declared by the above decisions to be the slaves of the Nawab, and their claim to share disallowed on that ground, in two different Courts, the admission of an appeal founded on a claim which was to the same effect as that formerly dismissed, would be at variance with the provisions of section 9, regulation 2, of 1803. For, when a suit involving a question of inheritance had been decided according to law, it was not in the power of the plaintiffs to bring the same action again into Court by claiming a larger amount and suing other individuals. On these grounds, not considering the case one which could be legally gone

into, the Second Judge recorded his opinion that the decree of the Bareilly Provincial Court should be reversed with costs; further providing that if (acting on the decree of the Provincial Court) the appellants had given over to the respondents the forty-nine shares awarded by that decree the said shares should be forthwith restored to the appellants. The case came next before the Officiating Judge (J. Ahmuty) on the 1st of March 1824, and he, concurring with the Second Judge, judgment was, on the 13th of April, finally passed in favour of the appellants accordingly.

1824.
Seam Begum and others, v. Ghalib Jung Khan and others.

RAMCHURN LAL, Appellant,
versus

MUSSUMMAUT TEJ KOONWUR (Pauper), Respondent.

1824.
April 21st.

THIS suit was instituted to the Provincial Court for the division of Bareilly by the respondent on the 26th of August 1819, against Ajoodhia Pershad, (adopted son of Mussummaut Seetul Bhoo, wife of Dwarka Das, deceased), and Ram Chund and Bunseedhur; also, by a supplemental plaint, against Baboo Madhoo Sahaee and Baboo Benee Sahaee, infants, heirs of Mussummaut Seetul Bhoo aforesaid, and against Ram Lal, guardian of the two infants, residents at Benares, to recover the sum of 29,829 rupees, principal, and interest on the same, on account of a certain deposit of the above principal, the whole amounting to 138,326 rupees.

A plaintiff being non-sued on the ground that she sued for a part instead of the whole sum due to her from the defendant, and having subsequently instituted a new suit for the whole debt, which was awarded to her; on appeal by the defendant to the Sudder Dewanny Adawlut the nonsuit was reversed and the original case ordered to be retried on its merits; and judgment being again given for the plaintiff, the Sudder Dewanny Adawlut awarded payment of

The plaint by Tej Koonwur set forth, that her deceased husband Chowdree Jodha Bullee was in the habit of keeping his accounts at the house of Mynpooree, of which Bunseedhur was Gomashta. The said Chowdree had a certain balance in the hands of that house which he was accustomed to draw upon by orders signed and sealed. These transactions were carried on during the period between the years 1864 and 1866 of the *Sumbut* era. There had been transactions previously between Chowdree Jodha and Bunseedhur by which, and agreeably to the instructions of the former, the latter had become security for a certain Raja Himunchal Singh in the amount of 11,383 rupees; afterwards, however, an action was brought against him by Chowdree Jodha in the Bareilly Court of Circuit. When the suit was about to come on to a hearing, evidence was demanded from the parties, and the plaintiff put in accounts and other evidence to the point in question; the defendant simply resting his defence on the circumstance of his being a Gomashta of the house, and not therefore personally and singly liable for the debt. On an inspection of the accounts produced, it was seen that the action would lie for a larger sum than 11,383 rupees, which was not the whole amount claimable. On this ground the Judge ordered a nonsuit, with intimation to the plaintiff that a suit might be brought for the total amount due to him. The said Chowdree Jodha Bullee afterwards became involved in some difficulties respecting the

1824.

the whole debt, evidence of its being due having been furnished, and there having been no regularity in preferring the claim.

payment of his rents, and was unable therefore to prosecute his claim. On his death he left no other heir than the plaintiff, Mussummant Tej Koonwur. She, when applying for a settlement to the house aforesaid was referred for every thing to Bunseedhur, who denying all knowledge or connection with the business, the plaintiff was compelled to bring the present action.

The defendants were summoned, but not appearing, the suit came to a hearing on the 27th of September 1820. The claim of the plaintiff appearing substantiated by the absence of all defence, as well as the evidence of witnesses, further that Mudhoo Sahae and Benee Sahae (infants) were heirs to the interest possessed by Gopal Das and Dwarka Das in the house of business; that Ram Churn Lal (one of the defendants) was manager for the same house, with the full privileges of a partner; the Provincial Court decreed the payment with costs of 38,326 rupees, by the three persons abovementioned, namely, Madhoo Sahae, Benee Sahae, and Ram Churn Lal, to the plaintiff Mussummant Tej Koonwur.

From this decree the defendants appealed to the Sudder Dewanny Adawlut, and the case coming on before the Second Judge, the consideration of it was postponed to allow of a new trial in the original suit mentioned above, in which nonsuit had been ordered; also for the production of papers relative to the release of Raja Himunchul Singh by the interposition of the plaintiff's deceased husband Jodha Bullee.

It again came before the same Judge on the 19th of April 1824. It was seen that in the case of Koonwur Suddun Singh *versus* Raja Himunchul Singh for the recovery of 11,383 rupees, which was given in favour of the plaintiff in Zillah Etawah on the 16th of November 1808, and which decree being reversed by the Court of Appeal, the suit was finally brought into the Court of Sudder Dewanny Adawlut, and a decree there passed confirming that of the Court of Appeal, the defendant Bunseedhur put in a document, constituting himself security for the Raja Himunchul Singh (who was then under confinement for nonpayment of the costs of suit,) both for the appearance of the said Himunchul and his payment of the debt. From the papers which had been sent according to requisition from the Court of Appeal at Bareilly it was ascertained that the amount in which Bunseedhur was nominal surety had been paid into the Court on the 8th of July 1809, and was returned to him on the subsequent reversal of the Zillah decree: for this a receipt was among the records of Court, and in that receipt the above Bunseedhur called himself Gomashta to Gopal Das and Dwarka Das. From the evidence put in by the appellant (Ram Churn) it was manifest that he had refrained from producing the books of the house, since from them the connection of the house with the business in hand would be proved. Nor did the appellant deny the agency of Bunseedhur, but stated him to be one in whom no confidence could be placed, and who had embezzled large sums of his employers money.

On these grounds, it was clear to the Second Judge, that the sum was paid through the house, and returned back to the house, the partners of which were therefore accountable for the same; and that when it was paid back, it was not placed to the account

of Chowdree Jodha Bullee, to whose heirs it was at present due. 1824.
 This being sufficiently made out by the evidence, he was of opinion that the decree of the Bareilly Court should be affirmed, as far as regarded the sum of 11,383 rupees, but he by no means agreed in the other points of the decree. He therefore recorded his judgment, that a decree should be passed amending that of the Bareilly Court, and awarding to the respondent the sum of 22,766 rupees, being the interest and principal on the sum above mentioned.

Rmchurn
 Lal, v.
 Mussum-
 nat Tej
 Koonwar.

The case being next brought before Mr. Shakespear (Third Judge) on the 20th of April 1824, he recorded his opinion to the following effect :

It appears that the respondent brought an action for 11,383 rupees, as security money for Himunchul Singh, in the Bareilly Court of Appeal, in which case a nonsuit was ordered for the reason given above ; and the plaintiff then brought another action for a larger sum, namely 38,326 rupees. From the oral and documentary evidence it is clear that Bunseedhur, Gomashta of the house of Dwarka Das, paid into Court the sum of 11,383 rupees, as security money for Himunchul Sing, out of monies deposited with the house by Chowdree Jodha Bullee, and that this sum was afterwards returned to the house through Bunseedhur. As the return of this sum was not to be found in the account current of Jodha with the house, the Third Judge stated that his opinion corresponded with that of his colleague respecting the award of the sum of 11,383 rupees. As to the further sum, his opinion was that there was no reason why, in the previous case before the Bareilly Court, the plaintiff should have been nonsuited because he brought his action for a particular sum, less than the whole amount claimable ; yet as the case had occurred, the plaintiff had made out a clear title to the remaining sum also, which there seemed no reason against awarding to him. From the evidence on the case, it was clear in the Third Judge's opinion, that Bunseedhur was the Gomashta of the house, and by the custom of the country the heirs to the interest in a banking house are answerable for all acts done in the name of the house by its agents. Bunseedhur had admitted by the accounts produced by him before the Court, that he had received from the husband of the respondent 29,829 rupees, but no proof was brought to the assertion that 30,507 rupees had been drawn by that individual from the house. It was incumbent on the appellant to bring forward their original account current with Chowdree Jodha Bullee, his orders on the house, and the evidence of witnesses to prove this fact.

On these grounds (the Officiating Judge, J. Ahmuty, concurring) a decree was passed on the 21st of April 1824, affirming that of the Bareilly Court, and dismissing the appeal with costs ; interest was ordered to be paid at the rate of 12 per cent per annum on the sum awarded, from the date of the Bareilly decree up to the time of payment by the appellant.

1824.

• RAMKISHEN RAI and another, Appellants,

versus

April 26th.

GOPEE MOHUN BABOO, Respondent.

Held that a claim against the party in possession, to certain alluvial lands, and a claim against an *aumeen* to the profits realized while the lands were under attachment by him, may be preferred in the same action.

THE respondent instituted this suit in the Dacca Provincial Court on the 29th of January 1817, against the appellant and three others, to recover possession of 500 beegas of alluvial lands annexed to Mouza Gungapershaud, &c. in Tuppa Huveillee Muhmoodpoor. Suit laid at 2,500 rupees annual produce, and 35,416 rupees mesne profits. Total 37,916 rupees.

The plaint set forth that the parties were zemindars whose estates were situated on opposite banks of the Puddabutte, having that river for their common boundary; the above lands, which belonged to the plaintiff, being situated on the north, and pergunna Chur Mokundiah, the zemindaree of the defendant (Ramkishen Rai) on the south side; that some years since, the river had considerably encroached on the plaintiff's estate, but had subsequently receded between the years 1201 and 1204, B. S., and the recovered lands were taken possession of by Maharaja Nubkishen Buhadoor, the plaintiff's father, who, in consequence of being forcibly ejected by Ramkishen Rai from a portion of them, brought an action against him in the year 1201, B. S., under regulation 49 of 1793, and was reinstated by the decree passed in his favour; but that subsequently, in consequence of a petition presented by Ramkishen Rai, Mahadeo Mokurjeah was appointed *Aumeen* for the purpose of attaching the lands and arbitrating between the parties; and that he, in company with his son Doorgapershaud Mokurjeah, accordingly sequestered the whole, and received the proceeds for ten years; that the Zillah Judge, on receiving the report made by these persons, ordered them summarily to restore the above lands to their proper owners, and to appear before him to give an account of the profits received by them; that upon this they put Ramkishen Rai into possession of the entire lands in dispute, with the exception of 38 beegas, 15 biswas, which they reserved for him; that the whole belonged exclusively to the plaintiff, and that as the alluvial land in question is included in the settlement entered into for the above named *tuppah* in the year 1213, B. S. in the Collector's office, and as mesne profits to the amount claimed, calculated at the rate of 2,500 rupees annual produce were due to the plaintiff, (who had only been in possession for four months in the year 1218, B. S.) from *Assin* 1206 to *Bhadoon* 1223, B. S., he had now recourse to the institution of a regular suit for redress.

Mahadeo Mokurjeah, in answer, stated that he had nothing to do with the plaintiff's title to the lands in dispute; that he had been appointed by the Court to arbitrate and attach the estate in question, and received the proceeds (from *Cheit* 1206 to *Bhadoon* 1216, B. S.) amounting to 5,051 rupees, 10 anas, 19 gundas and 2 cowries, besides 172 rupees, 12 anas from the plaintiff, and 647 rupees, 12 anas from Ramkishen Rai, to defray the expenses of the officers employed on that occasion; that out of this sum, 4,677 rupees, 8 anas, 11 gundas and 1 cowrie, went to pay the expenses

incurred, and 302 rupees, 13 anas were given to Rajkishen, an independent talookdar, as the proceeds of his estate, part of which had come under attachment at the same time, and the remainder (891 rupees, 13 anas, 8 gundahs and 1 cowrie) was paid into the Court; that in consequence of being very infirm, and as it was impossible to fix the boundaries without being on the spot, his son Doorgapershaud was allowed to act for him by the consent of both parties. Doorgapershaud Mokurjeah stated in reply, that he had been appointed *Aumeen* to complete the arbitration of the property in dispute, and in conformity to the orders of the Judge had delivered the papers connected with it to the Zillah Court, and had restored the attached lands to the original proprietors. Budunkishen stated that the suit did not affect him, he having been employed merely as a Collector of the rents under the *Aumeens*. Ramkishen Rai positively denied the claim, and alleged that he was not in possession of any lands belonging to the plaintiff; that the river Puddabutte was never the boundary between the two estates, as stated by the plaintiff, but that the lands claimed were parcel of certain mouzas in Jawar Allypoor, his (the defendant's) zemindaree; that Mozuffurabad and many other villages of which he was sole proprietor, as well as mouza Beharpoor, which he possessed in coparcenary with the plaintiff, were situated on the northern bank of the above river, and that he had likewise a zemindaree consisting of many villages on the southern bank, where the plaintiff also possessed mouza Bhowanee, which belonged to his estate; that both his own and the plaintiff's zemindaree were inundated in 1186, but the river returned subsequently to its former channel, and between the years 1197 and 1202 the lands became gradually reannexed as before, of which lands mouza Jeetkhandea, &c. came into the possession of Rajkishen, an independent talookdar, and the rest into the possession of the plaintiff: that he (the defendant) in the year 1200, B. S., purchased at public auction pergunna Chur Mokundeah, and is in possession of all the mouzas and Churs (including the ones now in dispute) as the former zemindars had been; that in consequence of disputes with regard to the lands in question, the defendant Mahadeo was appointed *Aumeen* to arbitrate and attach the property; that he accordingly made a local investigation, and presented a report, maps, &c. approved and acknowledged as authentic by the parties, to the Zillah Court; that Doorgapershaud succeeded the above named individual, and in conformity to the orders of the Zillah Court put the plaintiff in possession of 38 beegas of land belonging to him, and the defendant into possession of 2,362 beegas, 7 cottahs, to which he was entitled; and that the boundaries mentioned in the plaint were incorrect.

1824.

Ramkishen
Rai and
another, v.
Gopee Mo-
hun Baboo.

In consequence of the plaintiff having preferred two different claims (one for possession and another for mesne profits) the Second Judge of the above Court on the 17th of December 1808, conceiving that it was irregular to sue different individuals for the recovery of both claims in one and the same action, nonsuited the plaintiff, making the parties pay the costs respectively, and as the claim was for a sum less than 5,000 rupees, he was referred to a suit in the Zillah Court.

1824. On appeal to this Court from the above order of nonsuit the opinion of the Provincial Court was overruled, and they were directed to readmit the appeal and try it on its merits. This order was issued on the 16th of July 1819, by the Third and Fourth Judges (W. E. Rees and S. T. Goad) on the ground that the Court below should have proceeded in the first instance to try the fact of proprietary right, and should then have adjudged a refund of the profits realized from such portion of the land as might be decreed to the plaintiff, to be paid by the party proved to have appropriated them. On the receipt of this order, the cause being readmitted on the file, Moulouee Moohummud Nuzee was deputed to the spot as *Aumeen*, to ascertain the exact situation of the lands in dispute, on what side of the river they lay, and on what side the estates of the plaintiff and defendant were respectively situated; to take the depositions of such witnesses as survived, and had given evidence before the former *Aumeen*, Mahadeo Mokurjeah; and to enquire what quantities of land came into the possession of the plaintiff in consequence of the former investigation. It appeared from the survey and report made by the *Aumeen* that the defendant's zemindaree was situated on the south, and the lands in dispute on the north bank of the river Puddabuttee, surrounded on every side by the plaintiff's estate.

Ramkishen
Rai and
another, v.
Gopee Mo-
hun Baboo.

On the 1st of July 1820, the Senior Judge observed, that he considered the lands in dispute, inasmuch as they were surrounded by the plaintiff's zemindaree, to belong to him conformably to established usage in such cases, and accordingly ordered that he should be put in possession, making the defendant pay all the costs of suit; and, not crediting the statement made by Mahadeo Mokurjeah, to the effect that he had paid into the Zillah Court such of the proceeds of the lands as remained after discharging the necessary expences, he ordered the *Aumeen* to make an estimate of the profits of the above lands from the existing documents, and to deduct a reasonable sum for the payment of the expences which had been incurred; the defendants being declared liable for any excess above such reasonable expenditure.

The defendants, Ramkishen and Mahadeo, both appealed to the Court of Sudder Dewanny Adawlut from the above order. Ramkishen Rai was succeeded on his death by his sons, and Mahadeo Mokurjeah by his grandson. The case came to a hearing before Messrs. Leicester and Dorin on the 3d, 9th, and 16th of June 1823, when judgment was deferred till the production of certain documents connected with the case. It afterwards came, on the 26th of April 1824, to a hearing before the Officiating Chief Judge (J. H. Harington) who, having perused all the pleadings and documents in this case, saw no reason for altering the decision of the Provincial Court, which was founded on the report made by the *Aumeen* and the established usage in cases of the same nature, and which agreed with the principle of decisions in former suits of a similar kind, particularly with one decided on the 22d of April 1811, in which Radhamohun Rai and others were appellants, *versus* Soorujnarain Banoojeah, respondent, in which suit the decree of the Court was to the following effect: "It appears to the Court, that the river Maladee flows between pergunna Edilpoor,

the estate of the appellants, and Tappa Qadirabad, the estate of 1824.
 the respondent; that is, that the estate of the appellants is to
 the north, and that of the respondent to the south; that the river Ramkishan
 has for many years by encroaching in a semicircular form on the Rai and
 estate of the respondent washed away lands from the estate of another, v.
 respondent, and annexed land to the estate of appellants, thereby Gopee Mo-
 forming the *Chur* in question; and on the established principle hun Baboo
 that land thus gained by the gradual retirement of a river, under
 the general rules of alluvion, is the lawful accession of the estate
 to which it is so annexed, the Court consider that the appellants
 are entitled to the *Chur* in question." The judgment of the
 Provincial Court was therefore affirmed, and the appeal dismissed
 with costs. (a)

BEER PERSHAD CHOWDREE, Appellant,

1824.

versus

RAJ NARAIN DAS (Pauper,) Respondent.

April 26th.

THIS was an action brought by the respondent, on the 22nd of In a claim-
 December 1812, in the Dewanny Court of Zillah Midnapore, against to mesne
 the appellant and his agents, Luckhee Churn Das and Raj Narain profits of
 Das, to recover possession of 108 beegas, 12 cottahs of rentfree land, the
 land, comprised in nine mouzas, situated in Rughoonathpore, Zillah
 other places belonging to pergunna Kiddarkunt, at a valuation of Judge hav-
 2,711 rupees, the income of the land for ten years; also the sum awarded
 of 275 rupees in money, obtained by the defendants from the the pro-
 property: altogether 2,986 rupees. fits claimed
 without

It was stated in the plaint, that 115 beegas of land were set interest, it
 aside, partly for religious and other purposes, and partly were the is not
 purchased property of the plaintiff, to which effect a *sunnud* had competent
 been obtained from the Collector, and of which the plaintiff took to a single
 possession after setting aside 6 beegas, 8 cottahs, as the share Judge of a
 of his brothers, without any hindrance or opposition from any Provincial
 body; but that Beerpershad and the other two defendants had Court on
 by force ousted him and taken possession of the lands and all its appeal to
 income. award in-
 terest on
 the profits.

The defendant, Beerpershad Chowdree, in reply, stated in substance as follows:

'That the assertion of the plaintiff was false, as regarded the *sunnud* of the Collector, which was in several points fabricated and forged; for both in the judicial and revenue records, 15 beegas only of free lands in the mouza Billaseea Pursoo Rampore, &c. were entered in the plaintiff's name; that a copy of this record was in the hands of the defendant, bearing the signature of the Collector and the Board of Revenue, and that from this land

(a) The principle of the decision in this case has been since recognized in a formal enactment. The first clause of section 4, regulation 11, 1825, provides that land gained by gradual accession from the recess of a river, or the sea, is to be considered an increment to the tenure of the person to whose estate it may be annexed.

1824. the defendant had never ousted the plaintiff; that the plaintiff had taken on himself to constitute 7 beegas of land, situate in Mirza Nuggur, rent free, and had brought an action against Beerpershad Chowdree, v. Raj Narain Das. Bulram Chowdree for 71 rupees, the price of its crop. When the case was enquired into, the land was found to be liable to Government revenue and the suit dismissed, which decision also was confirmed on appeal: and lastly, that the decision of the Sudder Dewanny Adawlut in the case of Mussummaut Nund Koonwur versus Gunga Narain Sirkar, which rested on the authority of the revenue records, was enough to cause the dismissal of the plaintiff's suit. Lukhee Churn Das made the same defence; Raj Narain Das stated that the land in dispute was not rent free, and that he had been included in the list of defendants because the plaintiff was aware his evidence would establish that fact.

To the Acting Judge of the Zillah it appeared from the documents put in by the plaintiff, especially from certain *purwannas* signed and sealed by the defendant, Beerpershad, that the land in question was situated in the *perganna* of Kiddarkund, and the property of the plaintiff according to the *sunnud* produced by him. On this ground a decree was given for the plaintiff, putting him in possession of the 108 beegas of land in dispute, and ordering further that the defendant Beerpershad should pay over to him the sum of 230 rupees on account of profits unduly appropriated.

From this decision the defendant Beerpershad appealed to the Provincial Court of Calcutta where the appeal was dismissed by the Senior Judge of that Court, the decree of the Zillah Court confirmed, and interest awarded on the sum of 230 rupees above mentioned up to the time of the decision of the suit.

The appellant then proceeded by petition for a special appeal to the Sudder Dewanny Adawlut, which was allowed. The respondent presented a petition to the effect, that as he had been allowed to plead *in formâ pauperis* in the Sudder Dewanny Adawlut, an order might be issued from this Court to the Provincial Court of Calcutta to admit his petition to appeal there *in formâ pauperis*, which petition had been by that Court rejected in another case similar to the present.

In reply, the petitioner was informed, that on the decision of the case his prayer should be considered.

The case came to a hearing before the Second Judge (C. Smith), who, after examination of the papers connected with it, expressed his opinion that the appellant had not established in the Courts below any proof that the land in question was subjected to Government revenue, nor had he disproved the circumstance of the respondent's having had possession of the land and being ousted in the year 1219 F. S., which last circumstance had been fully and entirely proved. It appeared that the original *sunnuks*, dated 1785, were in all respects authentic, and bore no appearance of their having been in any way altered, also that the signature of Mr. Young, attached to the *sunnuks*, was genuine, as well as that of the Collector of Midnapore; and that the *sunnud* signed by the Collector bore on its margin in English the following words: "This *sunnud* was presented to the Collector for signature and registry before the expiration of the time mentioned in the 19th

regulation 1793, dated 5th of December 1796, Midnapore." The contents of this *sunnud*, both in Persian and Bengallee, clearly specified 115 beegas of land in the mouza of Billasea Pursao Rampore, &c. pergunna Kiddarkund. It also appeared that this *sunnud* had been filed in the Court of Zillah Midnapore in other cases. The claim of the respondent was also verified by several official papers bearing the authentic signatures of different public authorities. The established authenticity of the *sunnud* (being original) sufficiently refuted the authority of any other documents of which the contents might differ. If, on the documents produced, any alteration or insertion should appear, it could only be considered as the act of the zemindar wishing to appropriate to himself part of another's right. In a former case before this Court, when an alteration appeared on the face of a document, the Judges laying it to the charge of the zemindar's dishonesty, restored to the document the words which the true state of the case evidently required.

1824.

Beerper-
shad Chow-
dras, v.
Rajnarain
Das.

The decrees of the Zillah and Provincial Courts which awarded to the respondent 108 beegas, 12 cottas, of land to hold as a rentfree tenure, which was the quantity of land contained in the *sunnud*, subtracting 6 beegas, 8 cottas as the portions of other shareholders, were, in the opinion of the Second Judge, correct and proper.

The Provincial Court, he observed, however, had so far exceeded the Zillah judgment as to award interest on the sum of 230 rupees, decreed on account of mesne profits, which part of their decree this Court did not think proper to confirm, first, because the authority of one judge alone was not sufficient to admit of such alteration being made; second, because the award of interest appeared to the Court uncalled for and excessive.

If two Judges of this Court, he continued, should think proper to award the profits appropriated from the estate (without interest) from the year 1220, that part of the decree of the Provincial Court's judgment which decreed interest should be reversed.

With respect to the petition above alluded to, he saw ground to confirm the Provincial Court's order of not allowing the respondent to plead *in forma pauperis*.

The Officiating Judge (Mr. J. Ahmuty) entirely concurring in this opinion, a decree was then passed, amending that of the Provincial Court, and awarding to the respondent 108 beegas, 12 cottas of land to hold as a rentfree tenure, and the sum of 230 rupees, the unduly appropriated profits of the estate during the years 1219 and 1220, and up to the time of his again obtaining possession of the lands; but without interest.

Costs payable by the appellant.

1824. MOOHUMMUD ISMAIL JEMADAR, (Heir of QURAR MOOHUMMUD), Appellant,

May 3rd.

versus

RAJAH BALUNGEE SURRUN, Respondent.

Held that lands granted by the former Soobadar of Cuttack, to a *Khundait* or *Sirdar of Pykee*, who had held them at one invariable quit rent for more than twelve years before the Company's Government, are not liable to any increase of assessment, although the grant did not specify the terms *mo-kurrere*, *istimraee*, or other words signifying perpetuity.

THIS action was originally instituted in the Calcutta Court of Appeal by the respondent, on the 23d of August 1810, against Sheikh Qurar Moohummud, Moonshee Firasut Oollah and Moohummud Wasiq, to recover possession of the zemindaree called Killah Pareekoh, situated in the zillah of Cuttack, the annual assessment of which was stated to be 1,500 rupees; also to recover the sum of 12,000 rupees on account of profits unduly appropriated by the defendants. The plaint set forth, that the zemindaree in question was the hereditary property of the plaintiff; that in the time of the Mahrattas the annual tribute levied was six thousand *cashuns* of cowries, which amounted to the sum of fifteen hundred rupees, and which sum was regularly paid every year without any variation; that in the *Umlee* year 1198, the above named Killah became annexed to the pergunna of Manikputtun, and was assigned in *jageer* to Sheikh Kumal Moohummud Jemadar, who held it till the year 1203, when it devolved on his son Sheikh Futtih Moohummud, who held it on the same terms till the year 1209, during the Mahratta Government, and that, on the accession of the Company, the said Killah was granted as *jageer* to Futtih Moohummud to hold on the same terms; that after the death of Futtih Moohummud, his son Qurar Moohummud, in the year 1218, attempted to exact a larger tribute from the plaintiff, and on his resisting the demand, the said Qurar, with a view to oust him, gave a lease for three years of the lands under the substituted name of Moohummud Wasiq to Moonshee Firasut Oollah, who was one of the *Omlahs* of the Cuttack Court, and then, under the pretence of the plaintiff having ejected the said farmer, brought an action against him under the provisions of regulation 49, 1793, and by the contrivance of Firasut Oollah, obtained a decree in his favour; but that as the father and grandfather of the defendant had, for a period of more than twelve years, received tribute at one invariable rate, and as, according to the regulations existing in Cuttack, the Jageerdars were not entitled to exact from the zemindars of the Killahs any excess of rent, the defendants had acted wrongfully in procuring the dispossession of the plaintiff under a summary decree; that the gross produce of the estate amounted to the sum of 5,775 rupees, which, after deducting the rent due and the charges of management, left a net profit to the plaintiff of 4,000 rupees, which profit the defendants had unduly appropriated for three years. The defendant, Qurar Moohummud, replied, that the zemindaree of Pareekoh was formerly an appurtenance of the Raj or principality of Muharaja Meer Kishore Deo, the Raja of Khoordah, and the management of it was confided to the father of the plaintiff and one Puoorotum Rai, who paid variable rents; that at a subsequent period, Moohummud Kumal, the grandfather of the plaintiff, received the Muhal of Pareekoh and other places in lieu of personal allowance from the existing Government, and gave to

the father of the plaintiff, and afterwards to the plaintiff, the office of *Khundait* in the said *Muhal*, with the appellation of *zemindar*; that the father and grandfather of the defendant received from the estate, by the hands of managers whom they appointed to collect rents, various rates of revenue in different years; a portion of the lands being reserved as the *nankar* of the plaintiff, and the proprietors receiving in money from the Government any sum which might be required to make up their personal allowance, after deducting what might have been realized from the rents of the estate; that he had justly obtained a summary decree to eject the plaintiff when he had gone the length of attempting to oust the farmer by violent means; and, lastly, that the estate in dispute was not of the nature of those specified in the 12th regulation of 1805. The defendant, Moohummud Wasiq, replied, that he had taken a farm of the property from the lawful owner (exclusive of that part which formed the *nankar* of the plaintiff) at an annual rent of 2,500 rupees, but that his lease having now expired, he had nothing farther to do with it. Firasut Oollah stated that he had no farther connection with the property than what arose from his having, during the occasional absence of his nephew Moohummud Wasiq, looked after the farm and superintended the collections.

After the pleadings were completed, the suit was transferred by the operation of regulation 5, 1818, from the Provincial Court to the Court of the Commissioner of Cuttack, and on the 8th of July 1820, that officer recorded his judgment to the following effect: From the *purwanna* of the former Soobadar in the name of the plaintiff, dated in the *Umlee* year 1198, and from the documents bearing the signature of Kumal Moohummud and Futih Moohummud, the ancestors of the defendant, Qurar Moohummud, and the other evidence, oral as well as documentary, adduced in this case, it appears clearly that the *Killah* of Pareekoh was held at a tribute or quit rent of 6,000 *cahuns* of cowries, that is, fifteen hundred rupees, up to the year 1211, *Umlee*, being a period of nineteen years. By the provisions of the 49th, 50th, and 51st sections of regulation 8, 1793, by the contents of the *sunnud* granted to Futih Moohummud Jemadar, as well as by the invariable practice of the country, the defendant Qurar had no right to exact a higher rent than had been before paid; and he had totally failed in his attempt to prove that the rents had ever been paid by the plaintiff at a variable rate, or that the *Killah* in question was his hereditary property. The plaintiff was therefore ordered to be put into possession of the property claimed by him, to hold at a quit rent or tribute of 1,500 rupees annually, and it was farther awarded, that the said defendant should pay to him the sum of 2,319 rupees, on account of the principal and interest up to that date of profits unduly appropriated from the estate during the period of three years. All costs of suit were likewise made payable by this defendant.

The defendant, Qurar, being dissatisfied with the above decision, appealed therefrom to the Court of Sudder Dewanny Adawlut, estimating the eighteen years produce of the estate at 72,000 rupees. Dying shortly after, he was succeeded by his brother, the present appellant. The case came to a hearing, first before the Second

1824.

Moohum-
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madar, v.
Raja Bu-
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Surreau.

1824.

Moolum-
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Raja Ba-
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Judge (Courtney Smith), on the 22d and 23d of March 1824. His opinion was recorded to the following effect: The proceeds of the estate called Pareekoh, &c. were granted to Sheikh Futtih Moohummud, the father of the appellant, and his heirs, agreeably to the *sunnud* bearing date the 23d of December 1803. That *sunnud* is to the present day in full force. It is evident, therefore, that the 3d clause of section 35, regulation 12, 1805, has no relation to this case; that enactment having been promulgated in the month of September 1805, a period of nearly two years subsequent to the date of the *sunnud*. It is also evident from the 34th section of that enactment, that it was not the intention of Government to interfere at all with grants or privileges similar to those acquired by Futtih Moohummud; and as it appears from the terms of the *sunnud* that it never was intended to subject the estate in question to any assessment at all, it follows that the rules applicable to the assessment of Khoordah, or of any other zemindaree, have nothing to do with this question. The chief documentary evidence relied upon by the respondent consists of a *sunnud* granted by Raja Ram Pundit, Soobadar of Cuttack, bearing date the 16th of *Jumadee ool Uwul*, 1198, *Umlee*, and seven receipts purporting to have been signed by Kumal Moohummud and Futtih Moohummud, the father and grandfather of the appellant; but these are not sufficient to establish his claim, because, as to the *sunnud*, in the first place, it is not attested by witnesses, and, in the second place, even if it had been duly attested, all that can be collected from it is that the sum of six thousand *cahuns* of cowries was agreed to be paid as tribute for the *Umlee* year 1198; and it by no means implied that the tenure was to continue subject only to this quit rent in perpetuity. Luchmun Rai, the first witness on the part of the respondent, being asked for how many years the tribute for Killah Pareekoh had been fixed, pleaded ignorance of the subject. To the authenticity of the receipts there is only one witness, namely, Moohummud Waiz, who is notoriously at enmity with the appellant, who has manifestly prevaricated in his evidence, and whose evidence as to the signatures is, after all, merely conjectural. There does not appear, moreover, to have existed any reason to induce the respondent to have delayed taking receipts for six years, from 1204 to 1209, *Umlee*, inclusive, and at the end of that time to take one receipt for the entire period from Futtih Moohummud, when, as appears from his own statement, he paid annually the invariable sum of six thousand *cahuns* of cowries to his predecessor Kumal Moohummud, and regularly took his receipt for the amount every year. From the decree dated the 17th of June 1812, which was passed under the provisions of regulation 49, 1793, it appears that, on that occasion, the respondent produced only two receipts, one purporting to be signed by Kumal Moohummud, and the other by Futtih Moohummud, dated respectively, the 9th of *Rubee ool Uwul* 1202, and the 9th of *Jumadee ool Uwul* 1209, *Umlee*; where were then all these receipts which he now produces, and if he then produced a separate receipt for the year 1209, how has he now produced an aggregate receipt for the years 1204 to 1209 inclusive. The substance of the respondent's statement is this, that Futtih Moohummud lived until the *Umlee* year 1218,

and that there was never any altercation between them, that individual allowing him undisturbed possession, and he paying regularly every year the sum of six thousand *cahuns* of cowries. Supposing this statement to be true, how did it happen that he never obtained a single receipt from Futtih Moohummud, between the years 1210 and 1218? The Commissioner of Cuttack has pronounced the tenure of the respondent not liable to any encrease of assessment, on the ground that, for twelve years previous to the Company's Government, and after that up to the *Umlee* year 1218, he had paid revenue at one invariable rate. The rules quoted for this judgment are those contained in the 49th, 50th, and 51st sections of regulation 49, 1793, but (the Second Judge observed), it was not proved that during either of the periods alluded to, the assessment did not vary, and even if this fact had been proved, the rules cited were not applicable to the case, because those rules apply to persons who are *mokurrereedars* and *istimrardars*, not being themselves *zemindars*; but the respondent in this case is himself a *zemindar*, and if the *jageer* had not been granted in perpetuity to Futtih Moohummud, a settlement would have been made direct with the respondent; but by the *sunnud* granted to Futtih Moohummud, all rights and privileges appertaining to the Government were transferred to him and his heirs. Besides, admitting that the respondent was entitled to hold the tenure at a fixed quit rent, and that the rules cited by the Commissioner were applicable to this case, still this tenure would endure only during his life time, and would not descend to his heirs: and the decree of the Commissioner ought to have contained this provision. For the above reasons the Second Judge recorded his opinion that the decree of the Commissioner should be reversed, and that the respondent should pay all the costs with *mesne* profits. Moreover, that he should in future pay rent to the appellant at the rates usual in the *pergunna*, after deducting his own *nankar* or personal allowance, and the expences of management, and in the event of his failing to do so, the appellant should be declared at liberty to oust him and to put in another tenant.

On the 5th and 6th of April the Officiating Judge (J. Ahmuty) delivered his judgment in this case in the following terms: By the universal practice of this country, which is sanctioned by the regulations, *jageerdars* are entitled to all the rights and privileges of Government, and they are, therefore, entitled to levy from the *zemindars* whatever rent might be justly claimable by Government. In the event of the *zemindars* noncompliance with their demands they are entitled to make a settlement directly with the cultivators, but then the *zemindars* have a right to their *malikana* or proprietary dues. In this case, however, it appears abundantly proved, both by oral and documentary evidence, that for a long time past the respondent has held his tenure as a *mokurreree* or *istimreree* one, invariably paying the fixed tribute or quit rent of six thousand *cahuns* of cowries, or fifteen hundred rupees annually, which sum he was in the habit of paying through Moohummud Waiz the uncle of the appellant, and of his late brother Quarar Moohummud. The appellant has been unable to adduce any satisfactory evidence to prove that more than the

1824.

Moolum-
und Ismail
Jemadar, v.
Raj Bah-
lungee Sur-
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1824. sum in question was ever realized. From the *sunnud* granted to the *jageerdar*, Futtih Moohummud, and signed by the Commissioners, dated the 23d of December 1803, it appears that the grant conveyed to him all the rights and privileges of Government, and expressly contained a provision against his interfering with the rights of the zemindars. It also appears from the evidence adduced, that the lands in question are situated within the zillah of Khoorda, and provisions contained in the third clause of section 35, regulation 12, 1805, are therefore clearly applicable to the case. On these grounds, the Officiating Judge recorded his opinion, that the judgment of the Commissioner should be affirmed. In the above opinion the Officiating Judge (J. H. Harington), before whom the case was brought on the 3d of May, concurred; assigning the following reasons: The respondent was *zemindar* and *khundait* of Killah Pareekoh. On the 16th of *Jumadee ool Uwul*, 1198, *Umlee*, Raja Ram Pundit, Soobadar of Cuttack, gave him a *sunnud* in the following terms: "To Balungee Mrid Rajmun Sing Hureechundun, zemindar of Killah Pareekoh. The sum of six thousand *cahuns* of cowries has been settled as the annual tribute for the year 1198. *Umlee*, through the medium of Jemadar Kumal Moohummud. You will contentedly pay the sum so fixed through the individual abovementioned. Herein fail not." The Jemadar Kumal Moohummud received regularly this annual sum from the respondent, from the year 1198 to the year 1203, *Umlee*, giving him receipts for the same, in which he was styled *khundait* of Killah Pareekoh. Afterwards, from the year 1198 to the year 1210, during the Mahratta Government, Futtih Moohummud, the son of Kumal, received invariably the same sum as annual tribute from the respondent. On the 23d of December 1803, corresponding with the 9th of *Rumzan* 1211, *Umlee*, a *sunnud* for the office of *Thanadar* of Malood and other places was granted by the Commissioners to Futtih Moohummud, with an assignment of lands bearing a computed *jumma* of 38,853 *cahuns*, 8 *puns*, 10 *gundas* of cowries, inclusive of the 6,000 *cahuns* fixed as the tribute for the Killah of Pareekoh. The *sunnud* specified that the rents should be collected from the *mehals* comprised in the *jageer*, according to the regulations of Government, and that the *jageerdar* and his heirs were to succeed to all the privileges of Government, but in no way to interfere with the rights possessed by the *zemindars*, *khundaits*, and *mookuddims* of the *mehals* therein contained. Futtih Moohummud executed an undertaking to conform to these rules, and during his life time never attempted to exact more than the fixed tribute from the respondent. It is laid down in section 9, regulation 12, 1805, that, "nothing contained in the foregoing proclamation shall be construed to authorize the resumption of the rent of any lands at present appropriated to the maintenance of certain *sirdar pykes* and other *pykes* for the support of the police, provided, however, that any fixed quit rent which may be at present payable by such *sirdar* and other *pykes* conformably to the tenor of their grant, shall continue to be paid agreeably to established usage." With reference to the above provision, to the acknowledgment by the appellant and his predecessor, that the respondent is a *Khundait* (which term means a

Moohummud Ismail Jemadar, v. Raja Balungee Surrun.

sirdar of pykes) stationed in Killah Páreekoh, to the terms of the *sunnud* fixing the tribute, to the fact of its having been paid at one invariable rate for more than twelve years, between the year 1198 and 1211, to the insertion in the *sunnud* of police granted to Futtih Moohummud of the caution to levy the rent according to the regulations, and to the fact of that individual not having attempted to exact more than the fixed quit rent during his life, the appellant does not appear to be authorized to levy more than the annual tribute of six thousand *cahuns* of cowries, although the *sunnud* granted to the respondent by Raja Ram Fundit, the former Soobadar of Cuttack, makes no mention of a *mokurreree* or *istimreree* tenure, or other term implying perpetuity. On the other hand, agreeably to the regulation above cited, as well as to the rule contained in the 49th section of regulation 8, 1793, extended to Cuttack by the 36th section of regulation 12, 1805, which forbids the exaction of any encrease of rent from *istimrardars* who may have held their lands at a *mokurreree* rent for more than twelve years, the respondent seems clearly entitled to have his tenure confirmed at a fixed quitrent of six thousand *cahuns* of cowries.

1824.

Moohummud Ismail Jangadar, s. Raja Balungee Surua.

Under these circumstances the decree of the Commissioners of Zillah Cuttack, bearing date the 8th of July 1820, was confirmed, and the appeal dismissed with costs.

THE COLLECTOR OF GORUCKPOOR, Appellant,

versus

TOORUNT GEER and SIRDHA GEER, Respondents.

1824.

May 17th.

THIS was an action instituted by the respondents against Government, on the 4th of December 1818, in the Benares Provincial Court, to set aside the public sale of the talook Budheea Parah, in pergunnah Dhooreeparah, comprising 111 *mouzas*, 3 *chucks* and 30 *kashts* (without including the Toufeer mouzas and lands held free of assessment), the claim being laid at 8,393 rupees. The Pindarree chief Kureem Khan was afterwards made a defendant. The plaintiffs alleged, that the talook was mortgaged to them by Raja Futtih Bahadoor Chund, for 11,002 rupees, and that it being on the point of sale for a balance of 3,039 rupees, in 1219 F. S., caused by the Raja appropriating the collections to his private use, they discharged the arrears under a provision of the mortgage deed, and obtained with the sanction of the Board a regular settlement of the talook with themselves from the *Fuslee* year 1220 till the end of 1224; but were kept out of possession by the original proprietor and his sons, who brought the case into the Criminal Court, and caused them a loss of near 10,000 rupees in law expences and revenue payments; that they consequently, as the period for redemption had expired, made an application to the Judge under section 8, regulation 17, 1806, and obtained an order for possession, which the Provincial Court however reversed, directing them to bring a regular suit; that they

An auction sale by a collector of a defaulters lands set aside on the ground that he had purchased the lands on account of Government, and that he had refused a higher bid. Plea that the latter circumstance could only entitle the defaulter to compensation over-ruled.

1824.
 The Collector of
 Goruck-
 poor, v.
 Toorunt
 Geer and
 Sirdha
 Geer.

did so accordingly, on which precepts were granted by that Court requiring the Zillah Judge to take security from Raja Futtilh Chund, and save the estate from public sale; that the talook was, notwithstanding, attached by Government soon after, and advertised for sale on the 2nd of June 1818, for a balance of 3,114 rupees, and the Zillah Judge declining to act on the Court's precept, it was put up and bought in by the Collector on behalf of Government for 9,900 rupees, in the face of an advance of 100 rupees on that bid by Dookhurun Mul, although the Raja's sons paid in 600 rupees on the day of sale, and tendered the note of Sheodeen Bajpay, a *mahajun*, by which that person engaged to discharge the remainder in two hours; and although their (the plaintiffs) agent produced a copy of the Court's proceedings, and begged the sale might be postponed twelve days for him to make up the deficiency; or if not, that only such portion of the lands might be put up as would suffice to pay the arrears; that the Court, on the 11th of July following, passed a decree in favour of their claim, and ordered them to be put in possession of the talook, after having called upon the Collector for an account of the auction, and reversed the sale on that officer's answer, as an illegal transaction; that the Collector had, however, preferred a summary appeal from this order to the Superior Court, and delivered over the talook to Kureem Khan; that the present suit was grounded upon the very imperfect and irregular manner in which the auction was concluded; on the small amount of balance due; on the absence of any regulation which went to sanction the purchase of a zemindaree by Government, and on their own right to the estate under the Court's former decree.

It was answered on the part of Government and Kureem Khan, that the talook had been thrice advertised on account of the balance, which fell due in 1225, F. S., and the sale postponed each time to give the proprietor an opportunity or discharging the arrear; that the purchase of estates by Government had the sanction of long established usage, and that Dookhurun Mul did not make his advanced bid till after the lot had been cried three times and the sale concluded; lastly, that the sale of a large estate for a small balance was by no means illegal.

The claim was on the 15th of August 1820, decreed with costs, by the First Judge of the Provincial Court of Appeal, who did not consider himself borne out by the regulations, as construed by the Sudder Dewanny Adawlut, in upholding a public sale concluded under the circumstances stated by the plaintiffs, and established by their witnesses; from whose evidence it further appeared, that the Collector not only refused to receive the balance from the plaintiffs in conformity with a recorded order passed by the Court, on the 13th of June 1817, but actually knocked down the lot while the *mahajun* (Sheodeen) had with permission gone out to fetch the money due. Toorunt and Sirdha Geer were of course directed to pay up that deficiency.

On an appeal by Government to the Court of Sudder Dewanny Adawlut, the Chief and Officiating Judges (Messrs. Leycester and Harington) before whom the cause came to a hearing on the 15th

and 16th of December 1823, finding it mentioned in the Collector's proceedings that a notice, dated the 8th of May, fixing the 2nd of the ensuing month for the sale, was submitted to the Board and approved by them on the 19th of May, as well as a report of the sale sent into them afterwards, none of which papers, except the notice, had been filed in Court; and understanding from the Government Pleader that the Superintendent of Law Suits was not yet in possession of those documents, allowed him one month to produce them, and a statement of any evidence which could be adduced to invalidate the depositions of the opposite party's witnesses regarding the bid made by Dookhurun Mull, though not noticed by the Collector; and the alleged understanding between the latter and Sheodeen. In this interval the Chief Judge (Mr. Laycester) had been compelled to absent himself from his duties on account of ill health, and Mr. Harington, who succeeded him as Officiating Chief Judge, took up the case alone, on the 23d of February 1824, and having perused the papers filed in pursuance of the above order, it was objected by the respondents pleader that the final notice of sale was not issued till the 25th of May, or only a week before the property was sold, a fact which came to his clients knowledge when that and the three previous notices were produced in the Provincial Court, but which they were prevented from bringing forward before by the necessity of confining their pleadings to answering the reasons for appeal. It appeared on examination, that as no offer had been made for the estate in the two first instances, the sale was readvertized on the 25th of April, for the 26th of the ensuing month, on which day^(a) a fourth notice was eventually issued, purporting that the estate had been again advertized for sale on Tuesday the 2d of June, and that the Board had approved the measure. It was, however, no where shewn that the intermediate notice, thus adverted to, had been issued, or even submitted to the Board, and their letter merely authorized the sale to be carried into effect after "the usual notice of a month." The cause was therefore once more postponed to enable the Superintendent of Law Suits to ascertain whether the last notice had been fixed up in the principal village of the defaulter, which would establish the legality of the notice beyond question, under the fifth section of regulation 18, 1814. When the cause came next to a hearing, on looking over the papers filed in the Provincial Court, there was found a receipt in the handwriting of Raja Futtih Behadoor, dated the 8th of *Jeth*, and acknowledging the due service of a notice, which could be no other than that which was issued two days before; and the objection advanced by the respondents on this score was in consequence overruled: nor was credit attached to the assertion of the sale having been concluded while Sheodeen had gone out to fetch the amount due, as this plea was at variance with the plaint. The Officiating Chief Judge was, notwithstanding, of opinion that the position advanced by the Superintendent of Law Suits, who, after acknowledging his inability to adduce any

1824.

The Col-
lector of
Goruck-
pore, v.
Toorunt
Geer and
Sirdha
Geer.

(a) This last notice was mis-dated the 25th of May instead of the 26th, as was evident from the corresponding *Fuske* date, therein mentioned, *Jeth* 6th, 1225, F. S.

1824.

The Collector of Goruckpoor, Toorunt Geer and Sirdha Geer.

evidence to corroborate the Collector's report of his proceedings, had submitted that "allowing Dookhurun Mull to have made the bid he was said to have done, this would entitle the original owners to compensation for their loss, but would furnish no ground for invalidating the sale," was utterly untenable; that, on the contrary, a transaction in which the interests of the proprietor of the land sold were thus sacrificed was of no validity; as it was essential to the very existence of an auction sale, that the highest bid should be accepted; that in the case at issue, in which the Collector performed the opposite functions of bidder and auctioneer, the necessity of a fresh sale was obvious; and that an order to such effect would have been passed without doubt by the Governor General in Council, if the subject had in the first instance been duly brought to his notice. On the above consideration, the decree passed by the Benares Court in favour of the respondents, now become the representatives of the original defaulter, was affirmed, and the Government was subjected to all costs of suit.

1824.

SHEOPERSHAD and BECHUN LAL, Appellants,

versus

May 17th.

THE COLLECTOR OF GOVERNMENT CUSTOMS AT
BENARES, Respondent.

Claim to a small portion of land situate in the city of Benares dismissed on presumption that it had been resumed by the former Government, and had been occupied by the Company for full 20 years.

THIS was an action brought by the appellants, in the City Court of Benares, against the Collector of Government Customs, Moulavee Abdool Hadee, and Nerotum Doss, for possession of 200 beegas of land, adjoining to the garden of Madhoo Doss and lying within that city.

The plaint set forth, that the land, which they valued at 250 rupees, was the hereditary property of the appellants, but that their possession had been disturbed by the two last defendants, having, under orders from the Collector, settled people on one part of the ground, and marked out the remainder for a grain market.

Abdool Hadee declined answering the plaintiffs in detail, till they should give a faithful account of the transaction; asserting that the claim was totally groundless. Nerotum Doss, whom they had sued, as superintendant of the Deenanath Golah, denied that his holding this situation made him subject to the present action. The reply given in on behalf of the Collector, after denying that any one had encroached on the two beegas of land attached to Madhoo Doss's garden, detailed, that the Golah called after Deenanath, and the lands appertaining thereto, together with all the rest of his property, was given up to Raja Bulwunt Singh by that individual, who had fallen several thousand rupees in arrear on account of Muhummedabad and other pergunnas which he had taken in farm; that the land was afterwards retained by the Raja in his own hands, under the name of Moharaj Gunge, and had eventually been placed under the Collector

of Customs, on the expulsion of Cheyt Singh, and consequent acquisition of the province by the Company. 1824.

The claim was dismissed with costs by the Judge of the City, on the 15th of August 1814; the plaintiffs having failed to adduce proof that the land claimed (which on personal examination was found to be surrounded by the resumed ground) had been exempted from the resumption, either by witnesses (those who did appear having prevaricated in their testimony) or from the office of the Raja and Resident at Benares; and it being next to an impossibility that the lands could have been so exempted, as they were situated exactly in front of the house, which, together with the surrounding lands, have been occupied by the Collector's people since the rebellion of Wuzeer Ali. From this judgment an appeal was preferred to the Benares Provincial Court, which was dismissed by the First and Fourth Judges on the 19th of March 1819, no satisfactory proof appearing in favour of the claim.

Sheopershad and Begun Lal, v. the Collector of Customs at Benares.

On application to this Court, a special appeal was admitted on the 18th of August 1821, it appearing that the Second Judge of the Benares Court had differed from his colleagues, and it being deemed desirable that the grounds of his opinion should be more minutely investigated. The Officiating Judge (Mr. J. Ahimuty) before whom the cause came on, could, however, discover no solid grounds for altering the decision of the lower Courts; as the appellants did not deny that the whole property of Deenanath, including the Golah and its dependencies, had been resumed by Raja Bulwunt Singh, on that person falling ten thousand rupees in balance, and as it was very improbable that the ground in question was exempted from the resumption. It further appeared, that the ground had been occupied by the officers of Government for full twenty years, first as a cantonment, in Raja Cheyt Singh's time, till evacuated by Captain Smith, and ever since that period as a custom-house station, excepting such part of it as was intersected by the public road. No credit could be allowed to the appellant's witnesses, as some of them were in their infancy when the resumption took place, and as the evidence of the rest was merely hearsay. A final order was therefore passed, dismissing the claim and making the appellants liable to all costs.

1824.

RAJA RUGHOONUNDUN SINGH, Appellant,

versus

May 17th.

RAMDIAL SINGH, Respondent.

In the case of a bond bearing interest at 6 per cent, the Court will award payment of 12 per cent, on proof that the debtor had violated an engagement made to the creditor to put him in possession of a farm, as collateral security.

THE respondent was the original plaintiff in this case. He brought his action on the 16th of April 1818, in the Provincial Court of Patna, first against Raja Doost Duwun Singh and the appellant, and then, on the death of the said Raja, against the appellant and Juddoonundun Singh, his two sons, by an amended plaint; claiming to recover the sum of 9,920 rupees, the principal and interest of a bond debt. In the month of *Phalgun* 1220, F. S., (the plaint set forth) the above named Raja, to get rid of a debt which he owed to a Muhajun named Rai Risal Singh, transferred the payment thereof to the plaintiff, giving an order on the plaintiff to his creditor for the sum of 4,000 rupees, the amount of the debt, and executing a bond for that sum in favour of the plaintiff. As security for the repayment of this debt the Raja gave the plaintiff, in the name of his nephew Gopeenath, a five years lease of the villages of Suroia and Rooloburee, in the pergunna of Muhasee, and of mouza Bhounla in Sirkar Chumparun, to be held at a rent of 2,687 rupees annually. The plaintiff paid immediately the sum of 2,000 rupees to Risal Singh, but the payment of the remainder he deferred until he should obtain possession of the lands which had been let to him in farm. The Raja's relations, however, would not give the plaintiff possession of the lands which had been farmed to him, whereupon he solicited the Raja to repay him the money which he had advanced. The Raja, however, on a promise of giving a farm of other lands, obtained the loan of two thousand rupees more from the plaintiff, and cancelling the original bond and lease, he executed a new bond for the sum of 6,000 rupees, bearing interest at eight anas *per cent per mensem*. In consideration of this last mentioned bond an order was given on the plaintiff by the Raja, and a farm for five years of the talook Nooroolapoor was granted by the Raja's son Rughoonundun in favour of the aforesaid Gopeenath, the Raja at the same time granting to the plaintiff an assignment on the revenues of the said talook for the sum of 600 rupees, on account of interest and incidental expences incurred by him. This assignment was addressed to Thakoor Das, one of the *Omlahs* of the talook. The plaintiff's relation being put into possession of the farm in question, he immediately paid to Risal Rai the remaining sum of 2,000 rupees, and he paid also the other Muhajun, Motee Ram, the sum of 2,000 rupees, through Sheikh Noor Moohummud, taking receipts from both creditors. Afterwards the Raja fraudulently incited Thakoor Das to withhold payment of the assignment, and in the month of *Aghun* 1221, F. S., they ousted the plaintiff's nephew Gopeenath, who complained, first in the Criminal, and then in the Civil Court of Zillah Sarun, under the provisions of regulation 49, 1793. His suit was there dismissed, and he was desired to prefer any claim he might have, by the institution of a regular suit. The plaintiff, however, being a Muhajun, did not feel himself competent to cope

with the defendants in a dispute concerning landed property, and he therefore now preferred his claim for money had and received, with interest, at the rate of twelve *per cent per annum*, to which he was clearly entitled, the defendants having violated their engagement by dispossessing his nephew from the farm, from which he had realized no profits whatever. 1824.
Raja Ru-
ghoonun-
dun Singh,
v. Ramdial
Singh. Rughoonundun Singh, one of the defendants, replied by denying the claim *in toto*. He asserted that it was a conspiracy between the plaintiff and the Muhajuns; that his father never borrowed any money from or granted any lease to the plaintiffs, and that the bond which had been produced was a forgery, and the witnesses to it perjured. He prayed, in his replication, that the Muhajuns, Risal Singh and Motee Ram, to whom it was alleged that his father was originally indebted, and whose debts were stated to have been paid off by the plaintiff, might be summoned to give their evidence in the case. The other defendant, Juddoonundun, did not appear to plead. On the 29th of April 1819, the Third Judge of the Provincial Court gave judgment in favour of the plaintiff, on the ground that he had fully proved the authenticity of the bond for 6,000 rupees, granted by the father of the defendants, the execution of the leases as collateral securities, and the acquittances granted by the Muhajuns, whose claims the plaintiff had satisfied. He considered it wholly useless to summon those Muhajuns, as the defendant himself had charged them with having conspired with the plaintiff, and as nothing that they might say could, avail in the face of their own proved acquittances, even supposing them to turn round to the side of the defendants. It was ordered that the defendants should pay to the plaintiff the sum claimed, with interest from the date of the institution of the suit up to the date of complete liquidation of the debt, at the rate of 12 *per cent per annum*, on the ground that, although the undertaking in the bond was to pay only 8 *anas per cent*, the debtor had violated his engagement to put the plaintiff in possession of the farm as collateral security, from which he might have derived a profit that would make his interest amount to 12 *per cent*. All costs were made payable by the defendants.

The defendant, Rughoonundun Singh, being dissatisfied with the above decision, appealed from it to the Court of Sudder Dewanny Adawlut, and the case came to a hearing, on the 17th of May 1824, before the Officiating Judge (J. Ahmuty) who gave judgment to the following effect: From the evidence which was taken in this case, the execution of the bond by the father of the appellant (Doost Duwun Singh) for the sum of 6,000 rupees, on account of two different debts, is fully established, and the whole of the pleadings evince the justness of the claim. The objections of the appellant that the deeds are forged, and the witnesses perjured, are wholly unworthy of attention; for, if true, they should have been proved in the Criminal Court. To urge them in a Civil Court must be unavailing. As to the objection to the rate of interest awarded, that also does not appear entitled to any weight; for when the father of the appellant refused to stand to his engagement of giving the lands specified to the respondent in farm, it is but fair that the stipulation for a low rate of interest

should be set aside, and that interest should be awarded to the utmost extent allowed by the regulations of Government: The appeal was therefore dismissed with costs, and the decree of the Court below fully affirmed.

1824.

May 24th.

SHEORAM BRAHMACHAREE, Appellant,

versus

SUBSOOKH BRAHMACHAREE, Respondent.

The nephew of a deceased Brahmacharee appointed to succeed him in the *Guddee* of a religious endowment, on proof of his title being superior to that of the person in possession, for various reasons assigned in the decree.

THE appellant brought this action, *in forma pauperis*, on the 22d of February 1820, in the Bareilly Provincial Court, against the respondent to recover possession of Sungeerampoor, a rent free tenure and other property, as successor to the *Guddee* of Ramkishen Brahmacharee. Suit laid at 84,132 rupees, 11 anas; eighteen times the annual produce of the *lakhiraj* mouza, and value of the other property.

The plaint set forth, that the plaintiff went on a pilgrimage to Juggunnath, with the consent of his uncle Ramkishen Brahmacharee, whom he left in sole possession of all the real and personal property he had acquired. His uncle being subsequently taken ill, wrote to his nephew to return, but died on the 7th of *Maug* 1875, *Sumbut*, before the plaintiff's return, when the defendant, who was one of Ram Kishen's servants, with the assistance of Rampershaud and others, took possession of all the property. Upon this *Sumbhoonath*, the plaintiff's *Cheta*, or disciple, presented a petition to the Zillah Judge, setting forth the plaintiff's right to the property; but the Judge, without investigating his claim, ordered the defendant to be kept in possession, and referred the plaintiff to a civil suit. The plaint proceeded to state, that as the defendant had no right to succeed to the property of the plaintiff's late uncle, and as the plaintiff was sole lawful heir, he now sued for redress and to obtain possession of the real and personal estate.

The defendant, in answer, declared the plaintiff's allegations to be altogether false. He stated that the plaintiff was not of the same tribe as Ramkishen, and could not therefore be his nephew; that he had been removed by the late proprietor from mouza Sungeerampoor for improper conduct; that the rent free mouza was not granted to Ramkishen Brahmacharee for his own private use, but was endowed by Government as a *Wukf* for the support of poor people and other charitable purposes, and that a *Wukf* or religious endowment is the property of no person, nor can any one lay claim to it as heir; that the true state of the case was this, thirty years ago Ramkishen Brahmacharee, after the death of Govind Ram Das, the defendant's uncle, and of his *Gooroo*, took him (the defendant) who was of the same tribe, from his mother, at the age of seven years, brought him up as his own child, instructed him in the customs and ceremonies of the *Fakeers* and the worship of his own deities, and, during his life time, put him in possession of his *Guddee*, as well as all his property; when all the neighbouring *Mohunts* and religious mendicants having, as is usual

on such occasions, assembled together, declared him (the defendant) to be a proper successor to the *Guddee*. After the death of Ramkishen, the Collector and Board of Commissioners, with the consent of Government, sanctioned his succession to the *Guddee*, and appointed him to superintend the distribution of charities from the proceeds of the rent free tenure, as could be proved by a reference to the *purwanna* issued by the Collector. The claim, therefore, he insisted, which was preferred by the plaintiff, was quite unfounded. 1824.

On the 15th of September 1820, the First Judge of the Bareilly Provincial Court dismissed the plaintiff's suit with costs, on the following grounds, as stated in his proceeding of the above date : To dismiss the claim of the plaintiff appears to be the only proper mode of decision in this case, because, although the plaintiff has adduced sixteen witnesses in support of his claim, yet the defendant has adduced thirty-five who have deposed in favour of his right. Many of these have sworn to the fact that the plaintiff was expelled on account of his having formed a connexion with a *Dukhinee* woman, as stated by the defendant. They have also deposed that the signature to the letter produced by the plaintiff purporting to have been signed in the *Hindee* character by Ramkishen Brahmacharee is not in the handwriting of that individual ; and in a case of such conflicting testimony there is no resource but to attach the greater weight to the numerical superiority of the witnesses, which, in this instance, is in favour of the defendant. Narain Bhutt too, the witness who is stated to have written the body of the letter above alluded to, was called upon in the face of the Court to write a few lines in the *Hindee* character, which having done, it was found that there was no resemblance between his handwriting and that in which the letter was written, and admitting even he did write it, there is nothing to impugn the belief that it was not a fabrication after the death of Ramkishen Brahmacharee. It appears clearly from the order of the Nuwab Shoukut Jung, and the grant of the rent free tenure which accompanied it, that the property was conferred as a perpetual endowment, which species of property is not heritable, and consequently not claimable by the plaintiff, on the ground of his being nephew to the late incumbent. It is also proved that the defendant, in the presence of a large assembly of persons belonging to the tribe, performed the exequial rites due to the deceased, which he would never have been permitted to do had the duty properly belonged to another. The plaintiff having appealed to this Court, the case came to hearing before the Second Judge (C. Smith), who recorded his judgment to the following effect : The decision of the Provincial Court in this cause cannot be upheld for various reasons ; first, because it has been satisfactorily proved that the appellant is the nephew of the late Ramkishen Brahmacharee and belongs to the same tribe and country : secondly, because, on the other hand, it has as clearly been established that the respondent is in no degree related to the late Brahmacharee, but was merely his *Chela* or disciple ; thirdly, because the respondent Subsookh Ram performed the funeral ceremonies of the deceased only in consequence of the plaintiff's absence to the eastward at the time of Ramkishen's death ; fourthly,

1824.

Sheoram
Brahma-
charee, v.
Subsookh
Brahma-
charee.

because it had not been proved, neither was it probable, that the appellant had set out on his travels against the consent of Ramkishen; fifthly, because it is not true that the appellant was travelling for the purpose of traffic, for the witnesses have deposed that he went on a pilgrimage in conformity to the injunction of the late Brahmacharee; sixthly, because the respondent's statement that Ramkishen had expelled the appellant in consequence of his having formed a connection with a *Dukhinee* woman is altogether false; seventhly, because it appears from the letter dated in *Poon* 1875, *Sumbut*, from the late Brahmacharee to the appellant (which has been authenticated by the testimony of the writer himself as well as of other witnesses), that Ramkishen intended the appellant to succeed to the *Guddee* of mouza Sungeerampoor on his death; eighthly, because, when the appellant, in conformity to the order of the Judge, convoked an assembly of the neighbouring pundits and religious mendicants to determine on the succession to the *Guddee*, although they peremptorily wrote to the respondent to come to the place of meeting, in order that all differences might be settled, he never went near the spot: had he possessed any claim he would undoubtedly have obeyed the summons, and not have refused to submit to the judgment of the assembly, who unanimously decided in favour of the appellant's right, and publicly announced it in writing; ninthly, because it appears that Ramkishen died seven days after the date of the above letter, namely, on the 7th of *Maug* 1875, and that Sumbhoonath, the *Chela* of the appellant, on the 20th of January 1819, (which corresponds with the 9th of *Maug* 1875) two days after the decease of that individual, presented a petition to the Furruckabad Zillah Court, which agreed exactly with the contents of the appellant's plaint; and as the appellant was many miles distant from Furruckabad at the time when that petition was preferred, it could not have been dictated by him: this circumstance strongly corroborates the truth of the statement made by the appellant; tenthly, because the respondent avowed in his first petition, dated the 1st of February 1819, that the appellant is the *Chela* of the late Ramkishen Brahmacharee, and therefore his denial of the fact subsequently to the institution of the present suit, is manifestly false; moreover, the above petition does not set forth that the late Brahmacharee, a year before his death, invested the respondent with the garment of a *Guddee Nisheen* and resigned in his favour, it only states, "that he, a few days before his decease, granted the respondent permission to enter his private *Thakoor Dwara*, and that after Ramkishen's death the rajahs, zemindars, and disciples installed him (the respondent) in the *Guddee*, in conformity to the last injunction of the deceased;" and therefore the respondent's witnesses who have deposed that Ramkishen invested him with the garment of a *Guddee Nisheen* a year before his death, are not entitled to credit: neither does the petition of the above date set forth, "that the late Brahmacharee took the respondent from his mother at the age of seven years, promising to educate him and appoint him his successor." Such an assertion is of itself absurd, inasmuch as the succession to a Brahmacharee depends upon personal qualifications, and how could Ramkishen foresee that a child of seven years of age would,

on arriving at manhood, prove worthy or otherwise of the *Guddee*; eleventhly, because if thirty-five witnesses are adduced on one side of a question, and only sixteen on the other, a Judge is not compelled to consider the latter as perjured, and to attach credit to the testimony of the greater number. It was clear that the respondent had usurped the *Guddee* of the late Brahmacharee with the aid of certain ill disposed persons, during the absence of the rightful successor, and he might as easily have brought forward a hundred witnesses to depose in favour of his title. It is not right to disbelieve the evidence of witnesses merely because they happen to be adduced by the person ejected from the *Guddee*, and there is not the slightest ground for doubting the clear and undeviating testimony of the sixteen witnesses who have deposed in favour of the appellant's claim; twelfthly, although Maharajah Dowlut Rao Scindiah might have sent mourning apparel, &c. to the respondent, the right of the appellant is not invalidated by that circumstance; inasmuch as the affair did not happen in the territories of that chieftain, and the succession therefore did not fall properly within his cognizance. He most probably only intended to present the cloths, &c. to the successor of Ramkishen, whoever it might be, without any wish to interfere in the dispute about succession. For the above reasons the Second Judge recorded his opinion that the decision of the Provincial Court should be reversed; that the respondent should relinquish the *Guddee* in favour of the appellant, and that the latter should be declared entitled to succeed to all the real and personal property attached to it, and to the superintendence of the religious endowment as enjoyed by the late incumbent Ramkishen.

On the 24th of May 1824, the Officiating Judge (J. Ahmuty) having expressed his concurrence in the above view of the case, a final decree passed accordingly. Costs were made payable by the respondent.

1824.
Sheoram
Brahma-
charee, v,
Subsookh
Brahma-
charee.

RAJ CHUNDER DAS, Appellant,

versus

MUSSUMMAUT DHUNMUNEE, Respondent.

1824.

May 24th.

THIS was a suit originally instituted by Mussummaut Govind-munee the mother of the respondent, on the 5th of August 1813, against the appellant, in the Provincial Court of Calcutta, to recover a third share of the village of Peearpoor, and other places, chiefly situated in Zillah Nuddea; suit laid at 5,133 rupees.

In the plaint it was stated that the plaintiff's father-in-law had three sons, one named Ram Hurree Das, the plaintiff's husband; a second named Raj Chunder Das, the defendant; and a third named Ram Govind Das, who died leaving Radha Kishen Das his son, heir to his property.

After the death of the plaintiff's father-in-law, his three sons became jointly possessed of the property; some time afterwards, Ram Hurree Das having gone on business to a place called Chan-

According to the Hindoo law, as current in Bengal, on the death of a widow who had claimed her husband's property, her daughter will inherit to the exclusion of her husband's brothers.

1824. tullah, died there, in the absence of his wife (the plaintiff) and her daughter Dhumunee (the respondent). The defendant, who was present at the death of his brother, abstracted all the documents and papers which could bear upon the plaintiff's claim to her husband's interest in the property possessed by him in his lifetime, with the intention of defrauding her of her just rights, declaring at the same time that the deceased had given to him (the defendant) every thing of which he died possessed. The plaintiff hearing of these proceedings hastened to bring an action against him for her share in the property, but the defendant sending a message to her declaratory of his intention to make every thing right, and balance the accounts, &c., caused her to refrain from legal proceedings. After all, however, the defendant continued to keep possession of the property, declaring that it had been given to him, and produced a forged deed of gift, which had been originally written on unstamped paper, but he eventually got it forged on stamped paper, and inserted his own name (unknown to the plaintiff) as owner of the estate.

ther, if the daughter have or is likely to have male issue, and on her death without male issue, her father's brother will inherit, to the exclusion of her husband.

The defendant utterly denying every part of the plaintiff's statement, stated in reply, that the whole of the property claimed was acquired by his father and by himself; that the husband of the plaintiff was always sick and confined to his house, so that he was totally unable to make any acquisitions, or add to the property; that after the death of the defendant's father, being hopeless of life, and having no male heir, the plaintiff's husband did, in the presence of the plaintiff and respectable witnesses, sign a deed of gift in favour of the defendant, making over to him all his property, subject to the payment of a certain maintenance for the plaintiff; and that if the plaintiff was, as she stated, entitled to a share, she would have brought forward her claim when the business was in progress through the Collector's office.

Before proceeding to a decision in this case, the Judges of the Provincial Court put the following questions to their Hindoo law officer: A person who had no son dies leaving a widow who lays claim to his property, but she dies before the decision of her claim, leaving a married daughter and her husband's brother. In this case, which of these two claimants is entitled to take her late husband's estate? *Reply*, The daughter is the legal heir, if she have a son, or if there be any probability of her having one.—*Again*, If the daughter die leaving no son, is her husband or her paternal uncle entitled to the property which she had so inherited? *Reply*, Her husband has no lawful claim to it, but, on her death, it should devolve on her father's brother.

After perusing the above opinion, the following reasons appeared to the Court for deciding in favour of the plaintiff, Dhumunee (her mother, the original plaintiff, having died about this time). The property, it was established, from all the evidence, had been acquired by the father of the defendant and grandfather of the plaintiff, Fakeer Chund Das; there was no reason to believe that Hurree Das had made any addition to it, or that the mouzas he died possessed of were acquired by him otherwise than by inheritance from his father. From the *vyuvustha* of the Pundits of the Court, it was seen that Dhumunee, the plaintiff,

had a legal claim to the property, which came by inheritance to her father, namely, to a third share. The documents put in by the defendant, which were a deed of gift signed by Hurree Das, and an *ikrarnama* or deed of compromise signed by the plaintiff's mother, were evidently forgeries; for, of the witnesses brought to prove their authenticity, two had distinctly denied the very circumstances they were called to prove, and of those witnesses who did confirm the defendant's statement, the evidence was by no means worthy of belief. On these grounds, a decree was passed, awarding to the plaintiff a third share of the property left by her grandfather at his death. 1824.
Raj Chunder Das, v. Mussum-mah Dhanmuree.

The defendant from this decree appealed to the Sudder Dewanny Adawlut. The case having been brought before the Officiating Judge (J. Ahmuty), it appeared to him that it was necessary to consider two points, first, whether the deed of gift said to have been executed by Hurree Das was authentic or not; secondly, whether Hurree Das, under the circumstance of the case, namely, having a wife and a married daughter, could legally make over his property in the way of gift to the appellant. The first consideration, he observed, was set at rest by the evidence which disproved the authenticity of the deed of gift. It was, moreover, his opinion, that had the deed been authentic even, it was not in the power of the deceased to make a disposition of his property in the manner described, to the exclusion of his wife and daughter (*a*). On these grounds the appeal was dismissed, and the decree of the Court of Appeal affirmed with costs.

The appellant was also directed to pay up mesne profits from the date of the decree of the Provincial Court up to the time of the respondent gaining possession.

AMANEE TEWAREE, Appellant,

1824.

versus

RAI RUGHOO BUNS SUHAI, and others, Respondents.

June 5th.

THIS was an action brought by the appellant against one of the present respondents, Rai Rughoo Buns Suhai and Raja Sheo Suhai, on the 21st of May 1814, in the Provincial Court for the division of Patna, to obtain possession of a six ana share of the Talook Roopus, Pergunna Huroah, in the district of Tirhoot; the triennial assessment on which was stated to be 5,154 rupees.

The plaintiff was to the following effect. The plaintiff on the 4th of Rubeel ul uwul 1230, *Hijree*, corresponding with the 21st of *Magh* 1222, *Fuslee*, had purchased the said share of the talook from Rai Rughoo Buns Suhai abovementioned, the proprietor of a twelve ana share of that estate, for the sum of 9,090 rupees, and obtained a deed of sale for the same. The seller caused the transfer of the talook in proportion to the share disposed of, in

Lands purchased by a father in the name of his son, though registered in the name of the latter, being in the possession of the former, and *bonâ fide* his property, the son has no right to dispose of them.

(a) Perhaps not according to the Benares school; but query, under the enlarged interpretation of *Nareda's* text by *Jimuta Vahana*. See note to Colebrook's translation of the *Daya Bhaga*, page 33.

1824. the Collector's office, and ever since the plaintiff obtained an order for possession from the Collector, he had discharged the Government revenue due, the receipt of which payments he held in his hands, and had continued in peaceful possession of the property in dispute. One individual named Birsun, a resident of the said talook, brought a complaint for ejectment against the officers of the seller before the Magistrate, who required the attendance of the plaintiff, the seller, and Raja Sheo Suhai, the father of the seller. Accordingly the plaintiff himself appeared, and the said Raja presented a petition, stating that he had bought the said talook in the name of his son Rai Rughoo Buns Suhai, who was merely the nominal proprietor, and on this the Magistrate recorded his opinion that, as the talook was under the collection of the aforesaid Raja's officers, and Rughoo Buns Suhai was not in possession, he was utterly incompetent to sell the property, and consequently the plaintiff was compelled to enter into a penal recognizance in the sum of 6,000 rupees to abstain from all attempts at getting possession of the lands which he had purchased. The plaintiff appealed against the Magistrate's order to the Provincial Court of Circuit, the first Judge of which Court, confirming the above decision, passed an order that the plaintiff was at liberty to institute a suit in the Civil Court, which he now did accordingly.

Amanee
Tewaree, v.
Rai Rug-
ghoo Buns
Suhai, and
others.

The defendant, Raja Sheo Suhai, replied by stating that, in the year 1214, *Fuslee*, he had conditionally purchased a twelve ana share of talook Roopus, in the name of his son Rai Rughoo Buns Suhai from Purannath, the former proprietor of the estate, for the sum of 10,000 rupees, and getting the name of his son, the said Rai, registered in the public records by transferring that of the seller, obtained possession of the estate; that in the year 1219 *Fuslee*, he, in addition to the purchase money, paid six thousand rupees to the seller, and took back his agreement for the conditional sale which then became absolute; since which time he had continued in occupation of the estate without the smallest molestation from any one; that the appointment and removal of the Mofussil officers, the payment of the rents, the charge of the receipts and disbursements of the talook, &c. all rested with him; that the fact of Rai Rughoo Buns Suhai, being only a nominal proprietor, who had no power to sell or give a beega or biswa of the land to any person, was notorious; that he (the defendant) had regularly paid the rents up to the year 1222, F. S., and was wholly unacquainted with the truth or otherwise of the allegation made by the plaintiff, of his having paid the rents and procured the registry of his name as proprietor in the records of the Collector's office, and that although the plaintiff, without issuing a notice, within the period of twenty-two days from the date of the sale, did obtain an order for possession, yet that, immediately on being informed of the defendant having been dispossessed, the Magistrate had ordered him to be restored to his rights, which just order the defendant now begged might be upheld. Another of the defendants, Rai Rughoo Buns Suhai, son of the foregoing, answered to the plaint as follows; that he had borrowed the sum of 5,400 rupees from Rughoo Singh; and that the plaintiff had compelled him to execute a deed of conditional sale of a six ana share of

the property in dispute, in his name, on account of the sum borrowed, nominally, for the satisfaction of Rughoo Singh; the plaintiff, stating that he himself would never advance any claim to the property, and that he (this defendant) without the knowledge of his father, Raja Sheo Suhai; who had purchased the said property and was in the occupation and enjoyment of it, desired the Cazeer to make out a deed of sale, the price stipulated being 9,090 rupees; that, subsequently, the plaintiff, without fulfilling his promise of returning the accounts between the parties and paying the remainder of the purchase money; fraudulently obtained from the Cazeer the deed of sale and power of attorney, and immediately procured his own name to be registered as proprietor of the estate; that the defendant having heard this, began to contest the plaintiff's right, but he evaded the restoration of the deed of sale, and ultimately a dispute arose about the possession of the property, when the case came to a hearing before the Magistrate, in whose presence it was satisfactorily proved that the property had been purchased by the defendant's father, and by whom it was adjudged that the exaction of the deed of sale by the plaintiff from the defendant was illegal, which judgment was confirmed by the Court of Circuit, as had been admitted by the plaintiff. On the death of the defendant (Raja Sheo Suhai), his other sons, Rai Ram Bullubh and Koonwar Birj Koomar, appeared for themselves and as representatives of their minor brothers Rai Roodur Narain and Ram Mohun.

1884.

Amanee
Tewarce, v.
Rai Rug-
hoo Buns
Suhai and
others.

On the 13th of December 1820, the Senior Judge of the Provincial Court recorded his opinion to the following effect: Rughoo Buns Suhai admits the execution of the deed of sale, and of the power of attorney to procure its registry, and the transfer of proprietary right, but he alleges that the sum of 4,500 rupees on account of a former loan, and the sum of 1,000 rupees on account of a loan from Rughoo Singh were deducted from the amount of the purchase money, and that the remainder was never paid to him. It is not at all satisfactorily established under what circumstances the deed of sale and receipt was given by this defendant, or what portion of the purchase money was received by him, although the bill of sale for a twelve ana portion of the above talook, executed by Khem Nath, son and agent of Pran Nath, the former proprietor, dated the 13th of Kartick 1214, was made out in the name of Rughoo Buns Suhai; and although the transfer was made in his name in the Collector's books, yet the deceased defendant, Sheo Suhai, had alleged that his son Rughoo Buns Suhai was merely the nominal proprietor, and his name ostensibly used on the occasion. This allegation has been fully proved, and it has also been established that Sheo Suhai paid the whole purchase money, in the first instance 10,000 rupees on the occasion of the conditional sale, and secondly 6,000 rupees when the sale was made absolute, no part of the money having been advanced from the funds of Rughoo Buns. The former also had exclusive and uninterrupted possession from the date of his purchase. On these grounds the suit was dismissed. Under the circumstances of the case, however, the costs were made payable by the parties respectively, and the plaintiff was declared at liberty to prefer against

1824. Rughoo Buns Suhai any claim which he might consider himself to have against that individual.

Amance
Tewaree, v.
Rai Ru-
ghoo Buns
Suhai, and
others.

The plaintiff being dissatisfied with the above decision, appealed therefrom to the Court of Sudder Dewanny Adawlut, and the case came to a hearing before the Officiating Judge (J. Ahmuty) on the 15th of June 1824, who recorded his judgment in the following terms: In this case there appear to be two points which require consideration; in the first place, was the talook of Roopus purchased by the deceased Sheo Suhai, or was it the *bond fide* purchase of Rai Rughoo Buns Suhai? Now, although the transfer of the purchased property was made in the name of Rai Rughoo Buns, and although the purchase itself was made in the name of that individual, yet the collection of the rents and the entire management of the property evidently rested with Sheo Suhai. It is moreover, satisfactorily proved by the evidence of witnesses, that the estate was purchased by the latter with his own money in the name of the former, who was his eldest son. Of the purchase money it has been proved that twelve hundred rupees and three hundred gold mohurs, were sent from Patna by his people to the latter, and paid by him to the *gomashta* of that person; that it was with the express consent of Sheo Suhai that the name of his son was registered as proprietor, and that the rents were paid through Sheo Suhai, by whom the *tehsildar* was appointed. It is also proved, that Buns Suhai to the appellant, Sheo Suhai was continually opposing the transfer, and even went so far as to offer the appellant one or two thousand rupees to rescind the contract? and that ultimately, on his opposing the appellant's entry, the case was brought before the Magistrate, by whom it was determined that Rughoo Buns Suhai had no manner of right to negotiate a sale of the property which belonged to his father Sheo Suhai. The attempt on the part of the appellant to prove that the purchase money had been paid for out of the funds of the nominal purchaser has wholly failed. Under these circumstances, the present case does not appear to be at all of a nature with those *benamee* transactions which are prohibited by the regulations, as Sheo Suhai, in making the purchase in the name of his eldest son, acted only in conformity to the general usage and custom of the country, against which the prohibitory enactment was never intended to apply. Under these circumstances, the Officiating Judge expressed himself clearly of opinion that Rughoo Buns Suhai, the absent respondent, had no authority whatever to dispose of the estate purchased in his name by his father, and concurring in every particular with the decision of the Senior Judge of the Court below, that judgment was affirmed accordingly. (a)

(a) It is not exactly evident to what *benamee* transactions the Officiating Judge alluded. The practice of the Courts does not seem to condemn *benamee* tenures in the abstract. There is indeed a legal prohibition against purchasing lands at public auction in a fictitious or substituted name, but here the transaction was of a private nature. The merits of the case would appear to have depended rather on a question of fact than of law.

RAMKISHEN SURKHEYI, (Guardian of Iswor Chund Rai, minor, adopted son of RAM LUKHEE DIBIA, deceased), Appellant, 1824.
versus June 19th.
 MUSSUMMAUT SRI MUTEER DIBIA, and others, Respondents.

THIS was an action brought by Mussummaut Ram Lukhee Dibia, on the 12th of September 1817, in the Zillah Court of Backergunge, against the present respondent and others, to obtain possession of a one *ana*, three *gunda*, one *cowrie*, one *krant* share of a three and half *ana* share in the zemindaree of Kishen Rai Chowdhree, situated in pergunna Shayusta Nuggur; of a five *ana*, six *gunda*, two *cowrie* share of a talook known by the name of the said Kishen Ram Rai, and of a five *ana*, six and a half *gunda* share in a talook known by the name of Nursingh Deb Rai; the *jumma* of the whole, computed at thrice its actual amount, being 521 *rupees*, 14 *anas*, 4 *gundas*, 3 *cowries*.

The plaint set forth, that the above lands had been the property of the plaintiff's father-in-law, Kalika Persaud, who died in the month of *Poos* 1223, B. S., and of whom she and a son adopted by her were the heirs; that, however, on the occurrence of the aforesaid death, the defendant, Sri Muteer Dibia, daughter of her father-in-law, with Kalee Persaud Gungolee her husband, presuming on the necessary seclusion of her (the plaintiff's) life, and the minority of her adopted son, had conspired with the other defendants, and taken possession of the estate: that, therefore, she sued in her capacity of guardian of her son who was the rightful proprietor, but whose youth precluded him from pleading in his own person.

The defendant, Kunwul Kant Rai replied, that to any hereditary right over the lands in question, which was the ground of the plaintiff's plea, he never had made pretension; and therefore could not be compelled to put in any answer as to that plea. That the following facts were of his knowledge; that the defendant, Kalee Persaud Gungolee, had got and still retained the lands in his hands, on the alleged authority of a deed of gift, and that the said Kalee Persaud had given them to him, the defendant, on a nine years lease in *Bysakh* 1222, B. S.

Kalee Persaud Gungolee, another of the defendants, stated that the deceased Kalika Persaud had given his daughter in marriage to him, and having no son living, had, in the year 1218 B. S. made over to him, the defendant, by a deed of gift, all the lands included in the present plaint, with some others situated in the pergunna of Shayusta Nuggur, and a talook known by the name of Kishen Ram Rai, in the pergunna of Aurungpoor, reserving only two mouzas for his own maintenance, and one for that of the plaintiff, his deceased son's wife; that his father-in-law had, at the same time, executed an engagement promising that on his death the two mouzas which he had set aside for his own support should belong to his daughter Sri Muteer; that he, the defendant, had obtained possession through the aforesaid deed during Kalika Persaud's life-time, and had paid the *jumma* ever since; that his father-in-law had acknowledged the execution of the deed of gift

In the case of a Hindoo of Bengal dying in his father's life-time without issue, but leaving his widow authorized to adopt a son, if such adoption be made by the widow with the knowledge and consent of her deceased husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have been born to his daughter in wedlock, no such subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.

1824. in his reply to a suit instituted by the plaintiff ten years after her husband's death; in which reply he had further stated that the husband of the plaintiff (his son), had died without giving powers to his wife to adopt a son; and that, therefore, the adoption on which the plaintiff rested, her plea must be held altogether illegal. The defence of Sri Mutee, which was next filed, corresponded in all respects with that of her husband, the last defendant.

Ramkishen
Surkhey,
r. Mussum-
mant Sri
Mutee Di-
bia, and
others.

Two other defendants, Chunder Mune and Pudma Lochun, stated that they had been long engaged as writers on the establishment of Kalika Persaud, and had at his desire affixed their signatures as witnesses to the deed of gift made out by him in the name of his son-in-law, and that beyond this they had no knowledge of or connection with the matter under investigation. The remaining defendant, Radha Mohun, did not appear.

The decree of the Acting Judge, dated September 5th, 1818, was to the following effect: that the documents and evidence adduced by the plaintiff by no means established the legality of the adoption she had made, nor, in consequence, the right of her adopted son to the estate; for she had not been able to produce any paper signed by her husband vesting her with authority to make an adoption, which, had such authority been given, would have been valid; and although some witnesses had asserted that her husband had so empowered her by an oral permission, still as the reply of her father-in-law to her plaint in the former trial denied that permission had ever been granted to her in any shape, those assertions could not be received as conclusive and free from suspicion; that the adoption of a son by a wife without authority delegated to her from her husband was clearly forbidden by the Hindoo law; that it appeared from the deed of gift and other papers produced by the defendants, that Kalika Persaud had, on the death of his son, Lukhee Chund, given, with the full consent of his daughter Sri Mutee, all his property, with certain specific exceptions, to the defendant, Kalee Persaud; and that in a statement appended to his reply in the above mentioned former suit, he had acknowledged the validity of that deed, from the date of which it appeared that the said Kalee Persaud had had possession of the contested lands, even during a part of his father-in-law's life-time; and that, lastly, the allegation of the plaintiff that that deed had not been held valid in the former trial, had not been proved; for on a reference to the decree no mention had been found of any doubt as to its legality. The claim was therefore dismissed. The plaintiff, dissatisfied with this decision, appealed to the Provincial Court of Dacca, and Kalee Persaud dying, his widow Sri Mutee proving herself to be his heir, maintained the suit. This defendant and Kunwul Kant were the only respondents who appeared. The First Judge of the Court, on the 19th of June 1820, agreeing in the opinion of the Third Judge (delivered on the 13th of the same month), gave the following judgment: That although the first reply of the Pundit of the Court upheld the legality of the adoption which had been made, still his answer to another question propounded to him as to the validity of the deed of gift, was confirmatory of such validity and of the right of Kalee Persaud to the land in dispute; that that claim was also strengthened by the fact,

which had been placed beyond doubt by the documents and testimony adduced, that Kalee Persaud had got, and had for a long time held actual possession of the land; that therefore Kalee Persaud must be considered as the rightful owner of as much of the estate as was included in the deed of gift; and the adopted son, Iswur Chund, had a claim only to the mouzas reserved by Kalika Persaud for his own and the appellant's maintenance; that of course the deed of gift was only to be supported in its disposition of the property belonging by inheritance, purchase, or other right to Kalika Persaud, not of any portion which might have been added or acquired by Lukhee Chund himself; that, finally, the decree of the Zillah Judge should be amended as follows: The dismissal of the appellant's claim should be affirmed, but the declaration as to the illegality of the adoption of Iswur Chund should not be maintained; and to the last mentioned individual alone the mouza set apart by Kalika Persaud for his own maintenance should, according to the law laid down in the *vyavastha* of the Court Pundit, be delivered. The appellant's plea of special appeal was admitted in the Sudder Dewanny Adawlut on the 26th of July 1821, on the grounds detailed in the proceedings of the 26th of June and 21st of July of the same year. These were, that on an inspection of the case tried formerly in the same Zillah Court, in which the petitioner sued as plaintiff against Kalika Persaud and others, it appeared that, in the first reply of the said Kalika Persaud, which was given in by him in common with all the other defendants, there was no mention of the deed of gift, dated in the year 1218, B. S.; such mention not being found till the second reply, which was made six months after the former; that on this account, and on a knowledge of the enmity existing at that time between the petitioner and her father-in-law, that deed could not be held valid without the fullest enquiry; that on a conviction of the validity of that deed, the affirmation of the Provincial Court seems to have been given to the decree of the Zillah Judge; that it further appeared from the proceedings in the above mentioned case, that in the rejoinder of the plaintiff to the reply of the defendants she had mentioned Kalika Persaud's having signed a paper on the 8th of *Bysakh* 1217, B. S., expressive of his knowledge of the consent given to her by her husband to adopt, and there was found no document on the file containing either an acknowledgment or denial of the assertion; and that enough of suspicion therefore attached to the matter to entitle it to another hearing. Ram Lukhee Dibia dying about this time, Ram Kishen Surkheyl was permitted to prosecute the claim of Iswur Chund in the capacity of guardian. The case came to a hearing before the Second Judge (C. Smith) on the 10th and 11th of May 1824. The following interrogatories were put to the Court Pundit, and answers received from him.

1824.

Ramkishen
Surkheyl,
v. Musum-
mant Sri
Mutee Di-
bia, and
others.

Question 1st.—A Hindoo inhabitant of Bengal died, leaving a daughter, whose husband is alive, and an adopted son of his son who died before him; and some years after his death his daughter brought forth a male child. In this case, according to the law as current in Bengal, will his inheritance devolve on the adopted son

1824. of his son, or on his daughter's son ; if on both, what are their respective shares ?

Ramkishan
Surkheyl,
c. Musam-
mant Sri
Mutee Di-
bin, and
others.

Question 2nd.—A Hindoo widow having obtained her husband's sanction to adopt a son, does so ten years after his death. Is the adoption which took place after so long a period from her husband's death good and legal, and is such adopted son entitled to inherit from his adopting mother's father-in-law or otherwise ?

Question 3rd.—The grandfather, by whose direction and consent the widow had adopted the son, after such adoption, having been displeased with his son's widow, made out a deed of gift in favour of his son-in-law, and put him (the donee) into possession of his entire landed property of both descriptions, ancestral and self-acquired. Is the deed of gift valid in such case, and is it an impediment to the adopted son's right of succession to the property ?

Question 4th.—Should the grandfather have executed the deed of gift in favour of his son-in-law previously to the adoption, in this case will his property devolve on the adopted son or not ?

Question 5th.—If the donor have executed the deed of gift either in 1221 or 1222 B. S., and antedated it to 1218, B. S., by the collusion of his son-in-law, in this case will the deed of gift be held null and void by reason of such false entry, or will it be considered good and legal notwithstanding ?

Reply 1st.—If a Hindoo of Bengal die, leaving a daughter who is likely to have male issue, and an adopted son of his son, the son dying before his father, and a few years after that the daughter bear a son, in this case, the adopted son is entitled to the succession, even though the daughter and her son are living. However a discrepancy exists on this point between the text of *Devala* quoted in the *Daya Bhaga*, and that of *Menu*, who holds the first rank among legislators. This opinion is delivered agreeably to the doctrine of *Menu*.

AUTHORITIES.—"Of the twelve sons of men whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs, six not heirs; except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs." The two texts of *Menu*.

Reply 2nd.—A Hindoo widow having obtained her husband's sanction may adopt a son after ten years from the date of her husband's death, and the adoption is legal. Such adopted son is entitled to inherit from his adopting father's father, for there is no fixed period for adopting a child on the expiration of which the adoption can be held void.

Reply 3rd.—Should the widow of the son, with the consent of her late husband and his father, have adopted a son, and subsequently, should the father, being displeased with his son's widow, have given his property moveable and immoveable to his son-in-law, the gift must be considered illegal, and the son-in-law can derive no right thereby to the property given.

AUTHORITIES.—"What has been given by men agitated with fear, anger, lust, grief, or the pain of an incurable disease, or,

&c. &c. must be considered as ungiven." The passage of *Nareda* 1824. cited in the *Vivadarnuva Setoo*.

Reply 4th.—Though the grandfather, previously to the adoption, have executed a deed of gift assigning his property to his son-in-law, yet the adopted son had acquired a prior title to the property, the permission (which the deceased son had left with his widow to adopt a son) being considered in the light of her pregnancy, in other words, the boy ultimately adopted being entitled to all the rights of a posthumous son.

AUTHORITIES.—"Even they who are born, and yet unborn, and they who exist in the womb, require funds for subsistence; the deprivation of the means of subsistence is reprehended." The text of *Meau* (a) quoted in the *Daya Bhaga*.

Reply 5th.—Should the donor in the year 1221 or 1222, B. S., have executed a deed of gift in favour of his son-in-law, and have antedated it to the year 1218, B. S., to defraud his son's adopted son, in this case the deed of gift must be held null and void by reason of its containing a false entry. This *vyuvustha* is conformable to *Menu*, the *Daya Bhaga*, and other legal authorities as current in Bengal.

After perusing the above opinion, the Second Judge recorded his judgment on the 18th of May 1824, to the following effect; that it appeared that the deceased Lukhee Dibia had, before the institution of the suit on which the present appeal was founded, brought an action for two other talooks against the deceased Kalika Persaud (then living) with his daughter and her husband, in the same Zillah Court on the 25th of April 1814, corresponding to the 14th *Bysakh* 1220, B. S., that from a view of the proceedings in that case it was evident that the deed of gift, professing to have been written the 2d of *Bysakh* 1218, B. S., was actually not in existence at the time of the reply of the defendants in that case; that is, on the 14th of September 1814, corresponding to the third of *Bhadoon* 1221, B. S., since in that reply there was no mention of such a deed, and it may be considered as certain that had such a document been in existence, the defendants would not have failed to insist on it; that the said Kalika Persaud had stated in his reply that his daughter was not without hope of offspring, and supposing him to entertain such hope, there seemed no conceivable reason why he should convey his property, as he was subsequently alleged to have done, to his daughter's husband; that Kalee Persaud and his wife Sri Mutee had, at the same time, denied having any connection with the property claimed in any way, which they would not have done had such an instrument as a deed of gift been previously executed in their favour; that the first mention of that deed was to be found in a statement appended to his former one by Kalika Persaud on the 6th of February 1815, corresponding to the 25th *Bysakh* 1221, B. S., and was altogether undeserving of confidence, contradicting, as it did, the former allegations of the same person and his fellow defendants; that therefore it seemed clear that the said Kalika Persaud had, subsequently to the filing of his first defence, conspired with his son-in-law with some fraudulent intention, and had drawn up a deed of gift bearing

(a) But cited as the text of *Nareda* in *Coltbrooke's Digest*, vol. 2, page 227.

1824.

Ramkishen
Surkheyl,
v. Mussum-
maut Sri
Mutee Di-
bia, and
others.

a false date; such a deed being, as proved by the reply of the Court Pundit, entirely illegal; that it had been established that the adoption of the boy Iswur Chund had taken place in the month of *Aghun* 1221, B. S., two months before filing the amended defence, the mention of a deed of gift in which, for the first time, could, in consequence, only be looked on as an expedient of the writer to deprive the adopted boy of his rights, and satisfy his son-in-law who wished to retain the inheritance for the son of whose birth he was then not without hope; that it had been moreover established, that the adoption of Iswur Chund had been made with authority from the husband previously received, and with the consent of the father-in-law; that a delay of ten years before such authority was acted on was not illegal as had been proved by the answer (No. 2) of the Court Pundit; and this was further supported by the fact, that the opinion of the pundit of the Provincial Court, given in ignorance of the existence of a deed of gift, was exactly to the same effect; that although another opinion of that pundit, given on the supposition of the deed of gift having been made out previous to the adoption, declared that deed to confer a superior right, yet the opinion in question could not be held applicable in the present case, when the allegation of the priority in date of the deed of gift had been shewn to be a mere fraudulent circumvention.

The whole estate was therefore adjudged to belong to the adopted son; subject to the necessary condition of providing for the maintenance of Sri Mutee.

The case was next brought before the Fifth Judge (W. B. Martin) on the 19th of June, who expressed his entire concurrence in the above opinion.

Judgment of the Courts below reversed with costs.

1824.

RAMNARAIN MITTER, Appellant,

versus

June 21st.

KALEE PERSHAD RAI, and others, Respondents.

The Court ordered a lease to be cancelled, though it contained no mention of a term; it not being expressly declared to be perpetual and appearing to have been granted to the same person, on the same day and for

THIS was an action brought by the present respondents in the Provincial Court of Calcutta, on the 28th of December 1811, against the appellant, to redeem a mortgage and to obtain possession of 532½ beegas of *lakhiraj* land in the estate of Rutunpoor, situate in the pergunna of Mughora, the estimated decennial produce being 5,325 rupees, with the principal and interest of some rents collected from it, amounting to 7,938 rupees, and to procure the reversal of a summary decree by which they had been adjudged to pay to the defendant the sum of 4,985 rupees 11 anas.

The plaintiffs stated, that Ram Mohun Rai, of whom they were the heirs, had mortgaged to a person by name Ram Mohun Bhowe for a term of six years, 471½ of the above number of beegas, for the sum of 451 rupees, on the 13th of *Phalgun* 1196, B. S.; that he had also given him a lease of these 471½ beegas, with 61 beegas besides of waste land for the term of the mortgage, as

a security for the payment of the loan he had received, with its interest; that being at the time much pressed for money, he had agreed that Ram Mohun Bhowe the mortgagee, should receive the same interest at the rate of 3 per cent per mensem; but as he could only profess to give the legal rate of 1 per cent in the mortgage deed, he had, to evade the difficulty, let the land, which paid in general 14½ anas a beega, for 8 anas a beega, and the uncultivated ground, included in the lease, at 2 rupees a beega for the first year, 4 rupees for the second, and 8 rupees from the commencement of the third till the end of the sixth and last year; that, by these means, both principal and interest had been paid off, and whatever in excess above the amount of that payment the defendant had received from the land up to the year 1203, B. S., when the plaintiffs first sought to recover the land, belonged to them (the plaintiffs); that at that time they had sought to recover the land, not by a legal process, but by beginning to collect rents from various of the tenants; on receiving intelligence of which, the aforesaid mortgagee, Ram Mohun Bhowe, brought two actions against them, one on the ground of the mortgage, and the other, as having been forcibly expelled from his property; that by means of a *purwanna* of the Court, issued on the latter of these claims, he got himself reinstated, and was in the full receipt of all the rents, but that the former claim was dismissed; that on this, they (the plaintiffs) began in 1207 B. S., to draw again some income from the land, when Ram Mohun Bhowe instituted a suit in the Zillah Court of Hooghly against them, and a person by name Kalee Das Rai, on the plea of ejection by violence from 3,225 beegas of ground in the talooks of Ruttunpoor, Bun Hooghly, and others, which he professed to have rented from them and the said Kalee Das Rai to whom they belonged, with a claim for rent unduly appropriated previous to his advancement of his claim; that before his death, which occurred shortly after this period, he sold all his right and title to any land which he had actually in his possession, or on which he had any claim, to the present defendant, who, as his successor, maintained the above mentioned suit in the Court of the Twenty-four Pergunnas, to the jurisdiction of which the disputed lands had been transferred from that of Hooghly; that the defendant had, by the decree of that Court, got awarded to him 870 beegas of the land, and 4,613 rupees 6 anas of the money claimed; that in conformity with the provisions of that decree he had, towards the end of 1216, B. S., obtained possession of the mouzas situated in the estate of Ruttunpoor, the property of the plaintiffs, and the lands in Bun Hooghly belonging to Kalee Das Rai; that that decree was affirmed in the Provincial Court, and the sum specified above ordered to be paid, which award was confirmed with the following alterations, on appeal to the Sudder Dewanny Adawlut: namely, that the land should remain in the hands of the defendant, but no money be paid until after the expiration of six months, during which time it was left to the option of them (the plaintiffs) to bring an action to obtain the redemption of the mortgage in the Provincial Court; that according to the directions of that amended award, they now laid their claim, having for their object, in addition to that men-

1824.

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1824. tioned in those directions, the obtaining from the defendant the sum, in all, of 7,938 rupees, comprising the surplus received from the land by Ram Mohun Bhose up to the year 1201 B. S., after the liquidation of the debt incurred by the mortgage and rents for the years from 1202 to 1206, B. S., during which time he had possession of the land, at the rate of 14½ anas per beega, (with the exception of a small portion for the year 1204, which they (the plaintiffs) had drawn directly from the tenants; and for the years 1217 and 1218, at the rate of one rupee a beega, as much being charged for interest as for principal, since the former in the long period of years which had elapsed exceeded the latter: They also sued for the reversal of a summary decree by which they were adjudged to pay for interest and principal of the rents at 14½ anas a beega for the period of their occupation from the beginning of 1207 till near the end of 1216, being the sum of 4,985 rupees, 11 anas.

Ramnarnain
Mitter v.
Kalee Per-
shad Rai
and others.

The defendant replied, that the plea of the plaintiffs by which they claimed full proprietorship of the disputed lands was utterly untenable, for that the facts of their connection with the property were these; that in the year 1171, B. S., a person by name Atma Ram Bhose obtained a perpetual lease of some land that was then waste, situate in the estates of Ruttunpoor Bun Hooghly, &c. from certain holders of *lakhiraj* grants, and among them the ancestor of the plaintiffs, in the name of his grandson Ram Soonder Bhose, and taking that land under his own management, cleared, cultivated, and otherwise improved it; that, subsequently, the said Ram Soonder Bhose sold the property in 1187, B. S., to a person called Radha Churn Ghose: that on his death his widow, acting on permission received from him, gave it with all the other property, moveable and immoveable, of her husband, to her brother Ram Mohun Bhose, by a deed of gift on the 22d of *Kartick* 1196, B. S., that Ram Mohun Bhose in 1211 B. S., sold all his right and title in it to him (the defendant), who got possession by means of the summary decree which the plaintiffs claimed to be reversed; that the ancestor of the plaintiffs had received from Ram Soonder Bhose, Radha Churn Ghose, and Ram Mohun Bhose respectively, the sum fixed in the original deed of perpetual lease, for the continuation of which payment the plaintiffs had a just claim on him (the defendant) but none for the full proprietary right to the land; that when in 1196, B. S., Ram Mohun Rai, ancestor of the plaintiffs, mortgaged the land to Ram Mohun Bhose, it was only as a security for the payment of a debt contracted by him, the permanency of the lease being in no way affected by it; and that this was clear from the fact, that the original deed happening to have been lost in that year, Ram Mohun Rai had given him another, also containing a grant in perpetuity, which instrument was falsely stated by the plaintiffs to have been a deed of lease for the limited period of six years; and that, finally, he (the defendant) was in actual possession of all the land involved in the claim with the exception of 93 beegas, of which he had been forcibly deprived by Tarnee Churn Rai, a nephew of the plaintiffs, to aid their views, under the pretence of their being part of his property.

The case was nonsuited on the 7th of July 1815, by the Senior Judge of the Court, on the two following grounds, first, because the action for the reversal of the summary decree could not be tried with that for the redemption of the mortgage and recovery of rents received from the land during some years of what was alleged to be illegal occupation; for the two causes had no sufficient connection; and, secondly, because the claim for the above surplus rents should be laid, not against the defendant, who did not purchase the land till 1211, B. S., but against the heirs of Ram Mohun Bhose, the mortgagees who had possession till the plaintiffs reestablished their own management in 1207, B. S.

1824.

Ramparain
Mitter, v.
Kalee Per-
shad Rai
and others.

The plaintiff presented a summary appeal against this decision to the Sudder Dewanny Adawlut, from which Court an order was issued, on the 8th of February 1816, directing the Provincial Court to permit the plaintiff to bring a second claim, within the space of one month, comprising all the several claims of the original action, but suing the heirs of Ram Mohun in company with the first defendant; and, in default of the plaintiff proceeding within the allotted time, to put in effect the provisions of the summary decree of the 15th of September 1809, for the reversal of which they had prayed. A new claim, framed in the manner prescribed by that order, was accordingly brought against the original defendant and Sheo Chunder Bhose and Muheswur Chunder Bhose, heirs of the deceased Ram Mohun: These latter stated in a petition, that the land in question had been sold by their father Ram Mohun Bhose during his life time; that they had no hereditary right to it, and were therefore not responsible for any debts which their father might have contracted on it during his period of possession.

The decree of the First Judge, of the 27th of July 1821, recited that the defence in this case was on the ground of a pretended perpetual lease of the land, for the support of which three documents were adduced, 1st, a deed of sale dated the 7th of *Jeth* 1211, B. S., from Ram Mohun Bhose to the defendant Ram Narain Mitter, 2nd, a series of accounts relative to, the land from 1187 B. S., to 1196, B. S., and 3rd, a deed of lease; that with regard to the accounts, they appeared to the Court to be palpable forgeries, fabricated for the purposes of the present case; that as to the deed of lease, it was found on comparing it with the mortgage deed of the 13th of *Phalgun*, 1196, B. S., to have been executed on the same day, by the same person, in the name of the same person, and involving exactly the same land; and to be different from it only in one point, which was, that the term of the mortgage was fixed at six years, while in the lease there was no allusion either as to perpetuity or limitation of the period during which it should remain in force; that when so much was similar it was natural to suppose that the existing difference was the effect of some accidental omission, and that the intention of the deed of lease was that it should extend only as long as the term of the mortgage; certainly, the perpetuity of the lease could not be implied from the mere fact of there being no mention of limitation; that therefore, whatever surplus Ram Mohun Bhose might have received from the land up to the end of 1201, B. S., above the sum due on account of the mortgage, belonged to the heirs of Ram

1824. Mohun Rai the mortgagor, that is, to the present plaintiffs; that this surplus was found on calculation to be 506 rupees, 5 anas; that Ram Mohun Bhowe was also to be held indebted to the heirs of Ram Mohun Rai for the amount of the principal of the receipts from the land from the commencement of 1202, B. S., to the end of 1206, B. S. with interest to the month of *Kartick* 1219, B. S.; the whole being 5,850 rupees, 2 anas; that these two sums should be paid from any money which might be realized from the effects of the said Ram Mohun Bhowe; that the plaintiffs should also receive from the defendant Ram Narain Mitter the rents of the two years 1217 and 1218, B. S., during which he had been in possession, with interest calculated as above, equal in all to 1,103 rupees; and that the plaintiffs should be released from the payment of the sum awarded against them by the summary decree of the 15th of September 1809. Judgment was accordingly given against the defendants, and the plaintiffs declared rightful proprietors of the lands, with the sums abovementioned to be obtained respectively from the persons and in the manner specified. To this order was subsequently appended another, given on a petition of the plaintiffs, by which the defendant Ram Narain Mitter was adjudged to pay in addition the sum of 4,492 rupees, the receipts from the beginning of 1219, B. S., up to the date of the decision of the cause. Ram Narain Mitter, dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut. The cause came to a hearing on the 14th, 15th, and 21st of June 1824, before the Officiating Judge (J. Ahmuty), who declared his opinion that it was clear the disputed lands were the antient hereditary property of the respondents; and that the assertions of the appellant that they had been long the property of the family of the person from whom, in 1211, B. S., he had bought them, were quite unworthy of credit. For the Court could place no dependance on the evidence of the three witnesses he had produced to prove the accidental burning of an original deed of perpetual lease; that further, the series of accounts professing to have been drawn up regarding the land from 1187 to 1196, B. S., inclusive, could not be considered authentic; that it appeared evident to the Court that the land had been given in lease on the day when the mortgage was completed, without any limitation as to time, with the intention of its being kept in farm until the amount of the mortgage should be realized from it by the mortgagee: and that had the old deed specified perpetuity, and had it been meant to renew such deed, the term perpetuity would undoubtedly have been expressly defined in the new deed. The decision of the Provincial Court was therefore fully affirmed, with costs.

Ramnarin
Mitter, v.
Kulee Per-
shad Rai
and others.

RAM NARAYUN DUTT and others, Appellants,

1824.

versus

MUSSUMMAUT SUT BUNSEE and others, Respondents.

June 23rd.

THIS was an action brought by the present respondents, in the Zillah Court of Mymensing, against the appellants, on the 14th of January 1817, to obtain possession of an eight ana share in the villages of Khutrae, Bulpoor, Bundgaon and others, situated in the pergunna of Hijraddee. The *jumma* of the share claimed, valued at thrice its actual amount, was stated to be 673 rupees 8 anas.

Case of a claim by the legal heirs adjudged, though opposed by an alleged deed of gift, it being doubted whether that deed was executed at all, or whether, at the time of its execution, the donor, from extreme old age, was in his sound mind.

The plaintiff set forth, that the whole of the villages claimed were the hereditary property of one Jye Gopal Rai and Jye Govind Rai, his brother, father of Mussummaut Sut Bunsee, one of the plaintiffs, and maternal grandfather of Lukhee Narayun and others; that the aforesaid persons, Jye Gopal Rai and Jye Govind Rai, possessed a right to equal portions of the villages, but had always held them in common; that about eight years before his death, the latter had grown weak in all his faculties, having lost both sight and hearing; that he died about the year 1206 B. S., at the advanced age of 109 years, leaving no heirs but the plaintiffs; that, under this impression, the plaintiff, Sut Bunsee, had performed for him the exequial ceremony of the *sraddha*, but that two of the defendants, Ram Narayun Dutt and his brother Raj Kishen Dutt, heirs of the aforesaid Jye Gopal Rai, pretending to have received the property of Jye Govind Rai from him by gift before his death, refused to admit the plaintiffs assumption of their rights; that on this Narayun Nundee (deceased), and Lukhee Narayun Nundee had filed a plaint in the Court to procure redress, but were nonsuited on the 21st of January 1805, on the ground that all the persons who had claims to the lands had not joined in bringing the action; and they were directed, at the same time, to sue, if they wished to do so, in common with the rest of the alleged rightful owners; and that lastly, because of that number, Moohindur Narayun, Ram Narayun, and Kalee Narayun, were not out of their minority, they had postponed their action till the present date.

Ram Narayun Dutt, and Raj Kishen Dutt, two of the defendants, replied, that Jye Govind Rai, their father's uncle, being at the time in sound mind and full possession of his faculties, had in the year 1200 B. S., granted to them all his property (with a few specific exceptions reserved for the maintenance of the plaintiffs), and his male and female slaves, by a deed of gift executed in the presence of the members of his family, the *Purohit* or family priest, and other trustworthy persons; that about six or seven years after the aforesaid conveyance of his property, he died, but that they, the two defendants, had possession, on the strength of the above-mentioned deed, during his life-time, providing for the support of the donor when alive, in conformity with a condition of the said deed; and after his death performing the ceremony of the *sraddha* to his manes; that the plaintiffs had no right to any of the land in their (the defendants) hands; nothing belonging to them but the maintenance before alluded to, and of which

1824. they had got possession from Jye Govind Rai himself; that the plaintiffs had professed that they had been delayed in the prosecution of their suit by the minority of some of them, but that this was clearly a mere pretence; for, so long as their mother was living, her children were disqualified by the Hindoo law from having any claim on the property of their maternal grandfather, but that in point of fact the plaintiff, Sut Bunsee, had wilfully deferred her plaint so long; that of the witnesses who had signed the deed of gift, some of the most respectable and trustworthy were dead, and one of the survivors, Ram Chunder Rai, had of late quarrelled with them (the defendants), from which circumstance the plaintiffs, hoping to establish their claim on a contradiction in evidence, had at last appeared in Court after more than twelve years had elapsed from the date of their former action; and lastly, that in their reply to that former plaint, they (the defendants) had stated 1202 as the year of the execution of the deed of gift, and, in doing so, had committed a mistake; for the real date was 1200 B. S., as might be seen from the deed which they were prepared to produce.

Ram Narayan Dutt and others, v. Mussumant Sut Bunsee and others.

Radha Kishen, another defendant, replied, that all his connection with the subject of the plaint was that one of the two other defendants, viz. Raj Kishen, had given him half of his share, which he had received by gift from Jye Govind Rai.

The plaintiffs rejoined, that they had never received from the deceased Jye Govind Rai the property as maintenance, which the defendants alleged them to have done; that, in the reply of the defendants to the former action, they had stated the 2d of *Poos* 1202 B. S., as the date of the deed, while now they gave out that date to have been the year 1200 B. S.; how then was this subsequent uncertainty to be reconciled with the minute exactness which they had affected in the former of their statements, and how was the fact of their having employed confidential persons to persuade the plaintiffs to consent to a compromise and accept certain portions of the contested land, compatible with the supposition of the existence of such a deed? Further, that in a suit brought by Ram Chunder Rai against the present defendants, although the *Sudder Aumeen* who tried the case had repeatedly urged them to produce the deed, they had not been able to do so; and that lastly, their present suit was instituted within twelve years after their former one, not as the defendants had pretended, after the lapse of that period.

The defendants, who were present, added to their former statement a simple denial of any persons having been sent by them authorized to effect a compromise with the plaintiffs. The defendant, Mussumant Tara Munees, did not appear. The decree of the Acting Judge, dated the 10th of February 1820, dismissing the suit, was to the following effect: That it had not been clearly proved by either party of what exact age Jye Govind Rai was when he died; but that he was, at the time at which the deed professed to have been executed, in his sound senses, and able to write his signature was clear; for, although some of the witnesses on the part of the plaintiffs had asserted that his reason was affected by the infirmities of age two years before that time,

still their evidence was little to be trusted on account of the connection subsisting between several of them and the plaintiffs; that the veracity of the defendants witnesses, and the right of the defendants to the disputed property was proved by the fact of their having held long continued possession; that the statement of the plaintiff, Sut Bunsee, that she had delayed bringing a second suit on account of the minority of her children, was not received, because she was of age; and being so, the Hindoo law rendered it legal for her to sue for her father's property; and that since she had delayed the prosecution of her claim from the date of the deed till 1222 B. S., a period of 22 years, that plea must be held illegal.

1824.

Ram Narayan Dutt and others, v. Mussum-fahut Sut Bunsee and others.

The plaintiffs, dissatisfied with this decision, appealed to the Provincial Court of Dacca, in which Court all the former defendants appeared, with the exception of Tara Muneo.

The decree of the Second Judge of that Court, on the 13th of September 1820, coincided in substance with the opinion expressed by the First Judge on the 11th of the same month, which was, that the decision of the Zillah Judge seemed to rest on two grounds, one, the long continued possession of the respondents; and the other, the delay of 22 years alleged to have occurred before the institution of the suit; that, therefore, the first fact to be enquired into was, whether the date of the present plaint was twelve years from the date at which the former plaint of the appellants was nonsuited or not? that in this inquiry, it was found that Jye Govind Rai died in 1206, B. S., and that the date professed on the deed was the 2nd of *Poos*, 1200, B. S.; that of the nonsuit being the 21st of February 1805, corresponding to the 2nd of *Magh* 1211, B. S.; that, therefore, between the first plaint and the ground of it, twelve years had not elapsed; and again, the date of this action was the 14th of January 1817, A. D., corresponding to the 3rd of *Magh* 1223, B. S., only 11 years, 11 months, and 23 days from the date of the nonsuit: moreover, that the degree and nature of the relationship between the parties was confessed by both. That the case then stood thus the appellants claimed as heirs, and the respondents on the authority of a deed of gift, the authenticity and legality of which document was the point material to the decision of the cause; that with regard to this, it had been proved by the evidence that at the date of the deed Jye Govind Rai was beyond 100 years of age, weak in mind and afflicted at once with deafness and blindness; that consequently, and with reference to the reply of the pundit to a question propounded to him, the deed of gift must be held not valid. It was accordingly ordered that the decree of the Zillah Judge should be reversed, and the property claimed be given up to the management of the plaintiff, Sut Bunsee, during her life time; the profits of the immoveable part being divided into five shares, one to be given to Lukhee Narayun, son of another daughter of Jye Govind Rai, and the other to be retained by Sut Bunsee and her family; it being provided that no actual partition of the property should be made during the life time of Sut Bunsee; but that such quintuple partition should be made on her death; provision being assigned for the maintenance of the respondent Tara Muneo.

1824.

Ram Narayan Dutt and others, v. Mussumant Sub Bunssee and others.

The respondents presented a petition for the admission of a special appeal, which was admitted in the Sudder Dewanny Adawlut on the 15th of April 1821, on the grounds detailed in the proceedings of the Court of the 1st of March and 2nd of April of that year. These were the long possession which the petitioners had had of the land, the protracted silence of their opponents, although they had received permission from the Zillah Judge to bring a new suit, and the absence of enquiry regarding the legal accuracy of such a deed, or its adaptation to the local usage of the country. On the demise of Raj Kishen Dutt, his wife Kurna Dasee maintained the suit as his heir. The case came on before the Second Judge (C. Smith) on the 29th and 30th of December 1823. Besides the papers of the immediate case, the *rywustha* of the Court Pundit in the cause Hur Lochun Mitr and others *versus* Kalee and others, with the letter of the Register of the Court bearing date the 4th of June 1818, addressed to the Acting Judge of Beerbhoom, were produced and read. The judgment given was to the following effect: That it appeared that the present appellants in their reply to the first plaint of the respondents in the Mymensing Court, had mentioned the existence of the deed of gift, and the mere accident of their having written 1202 for 1200, was not sufficient to attach discredit to their statement; that the proof of the validity of that deed required that three points should be established, first, that Jye Govind was the writer of the deed; secondly, that he was in sound mind at the time of writing it; and thirdly, the legality of such a deed at all: that, as to the first of these points, it seemed placed beyond doubt by the evidence which had been adduced, and the fact of the appellants having got possession according to the provisions of the deed; that as to the second, it also appeared that the donor was sound in mind at the date of the gift; and that, with regard to the third, it was clear, from the decree of the Sudder Dewanny Adawlut, in the case Chunder Rai *versus* Iswur Chunder Rai; the reply of the Court Pundit in the case Hur Lochun Mitr *versus* Kalee and others, which had been forwarded to Beerbhoom (a), and from the replies of the pundits, filed by the present appellants in the Zillah Court of Mymensingh, that such a deed of gift was lawful: that the reply of the Provincial Court Pundit, declaring the deed illegal was framed on the question as propounded by the Senior Judge of that Court, which stated that the donor at the time of his executing the instrument was infirm, deaf, and blind. These three points being established, the validity of the deed must be acknowledged. The Second Judge, therefore, recorded his opinion that the appeal should be adjudged; but the case was next brought, on the 26th of February, and the 2nd and 9th of March 1824, before the Third Judge (J. Shakespear) who expressed his opinion that the witnesses of both parties agreed in their statement of the

(a) This *rywustha* merely went the length of proving that a deed of gift may be valid though clogged with certain conditions, and that a person might convey all his property to another, though there was a stipulation in the deed that the donor should be maintained by the donee during his life-time, and that the unequal ceremonies of the former should be performed by the latter in consideration of the gift.

extreme old age of Jye Govind Rai, and that they differed in the following particular, the witnesses of the appellants declaring that person to have been in perfect possession of his senses till the day of his death, while those of the respondents denied it; that there was a strong presumption in favour of the correctness of the latter evidence, from the admitted facts of extreme age and infirmity; that, again, of one of the persons whose signature was affixed to the deed, Ram Chunder Dutt, the statement was evidently not worthy of credence, since he had so affixed his signature as if the donor was to his knowledge in his sound mind: while, subsequently, in his reply to the pleas of appeal in a case in which he was plaintiff *versus* the present appellants, he had declared the said donor to have been deprived of the use of his faculties, and had changed again in his oral evidence on the present trial; that further doubt was excited by the circumstance that in the case alluded to, from its commencement till its decision on the 24th of June 1816, by the *Sudder Aumeen*, the deed had never been shewn, notwithstanding the frequent urgency with which that officer had pressed its production, an omission not compatible with the supposition of the existence of the deed at that time; that it seemed, therefore, that the mention of the deed in that reply was a mere prospective pretext to serve the appellants purposes of depriving the heirs of Jye Govind Rai of their inheritance; that it was also to be remarked, that a certain degree of contradiction existed between the statements of the appellants, as to the dates of 1202 and 1200, which had both been assigned to the deed of gift. The case having ultimately been brought before the Fifth Judge (W. B. Martin) on the 23rd of June 1824, he concurred as to the propriety of dismissing the appeal, on the grounds detailed in the latter opinion; especially the contradictions in the different statements of Ram Chunder Dutt, and the fact of the appellants not having, in the case before the *Sudder Aumeen*, produced the deed, although repeatedly urged to do so.

Appeal dismissed with costs.

1824.
Ram Narayan Dutt and others, v. Musnammah and others.

THE COLLECTOR OF BENARES (on the part of Government),
Appellant,
versus
BABOO ULRUK SING, Respondent. 1824.
June 26th.

THE respondent instituted a suit on the 12th of September 1812, in the City Court of Benares, against the appellant, to obtain an abatement of 912 rupees, 13 anas, from the amount of the public revenue demandable from him for the talook of Soorhye Kooroop, pergunna Keeswar.

The substance of the plaint was as follows. The talook aforesaid is my zemindaree. At the settlement of 1197 F S., my father Baboo Roop Sing obtained a *pottah* to hold the talook at an annual *jumma* of 8,042 rupees, 11 anas, 3 pie. After the lapse of some years, my father presented a petition to Mr. Jonathan

On suit by the respondent to be exempted from the demand of increased assessment, claim disallowed on proof that

1824. Duncan the resident, praying for a deduction on account of depreciation in the produce of the talook. An investigation was accordingly made by Behari Lal Ameen, and the sum of 912 rupees, 13 anas, having been deducted from the aforesaid *jumma*, a new *pottah*, dated *Bhadoo Soodee* 6th, 1202 F. S., corresponding with the 21st of August 1795, was granted for an annual *jumma* of 7,129 rupees, 14 anas, 3 pie, which *jumma* my father paid during his life time. After his death I got a new *pottah* at the same *jumma* in my own name, dated the 25th of December 1800 (24th *Poos* 1208 F. S.) from Mr. Rutledge, the then Collector, and from that time to the present have paid the rents without any interference on the part of the officers of Government. The Collector has this year demanded from me the amount above stated, on the plea that my *pottah* is invalid; I have therefore instituted the present action against him with a view to be protected against this illegal demand. The Collector stated in reply as follows: Baboo Roop Sing, the father of the plaintiff, executed an agreement to take the said talook in farm for five years, from 1196 to 1200, F. S. both inclusive, at an annual *jumma* of 8,001 rupees. He never obtained any title as proprietor. After the expiration of his lease, in the year 1201, F. S., he presented a petition to the Resident praying for a deduction. An order was passed on his petition to this effect, that the rent fixed in the engagement should remain fixed and unaltered, and if every rupee was not paid up, the zemindaree should be sold. Moreover, it appears from the papers filed by Behari Lal, who was appointed *Aumeen* to grant leases to the cultivators, under a *sunnud* granted by Mr. Jonathan Duncan, in February 1795, that the rent of the said talook is entered at (land rent 8,128 rupees, 6 anas; cesses 189 rupees, 15 anas), 8,318 rupees, 5 anas *per annum*. Since the said papers were filed by the *Aumeen* no order has ever been passed for making any deduction from the *jumma* of the lands, either in the shape of a proprietary or farming *pottah*, nor is any mention made thereof in the *pottah* registry book. As the plaintiff has already been allowed the customary deduction of 10 per cent, and the expenses of collection, he cannot sue for a second deduction.

After a full investigation of the case, the City Judge passed a decree, on the 7th of May 1817, in favour of the plaintiff, on the following grounds: From the papers filed by the plaintiff it appears, that, after the expiration of the period of his farming engagement, his father obtained a decree in the *Moolker* Court for the proprietary right to the said talook, and also obtained from Mr. Jonathan Duncan, the Resident, a zemindaree *pottah* for the same at an annual *jumma* of 7,129 rupees, 14 anas, 11 pie, according to which he paid the rent during his life, and that after his death the plaintiff obtained a new *pottah* in his own name and at the same *jumma*, in the year 1201 F. S., and paid the rents up to the year 1218 F. S. Under these circumstances, there is no authority in the regulations for setting aside *pottahs* which have been so long in the plaintiff's hands, or for demanding from him any excess of rent, even though it should appear that the remission thereof by the Resident was erroneous. If this *pottah* be set aside on account of error, the whole of the

the former collector had erroneously granted a zemindaree *pottah*, deducting an allowance for *dehryek* and *bhurray*, which was the right of the *tehsildars* alone, and had been resumed on settlement with the proprietors, but the decree providing that no further increase should be demanded, a petition for review was granted, and it was finally decreed that the respondent should not be exempted from the increased demand, but that if dissatisfied therewith, he might apply for a new settlement.

settlements made by that gentleman would be liable to be set aside for the same reason. He (the City Judge) therefore passed a decree in favour of the plaintiff, restraining the Collector from demanding from the plaintiff the sum aforesaid, (912 rupees, 13 anas), and directing him to receive from the plaintiff the revenue due from him under the *pottah* of 1202, F. S. The costs of suit were made payable by the Government.

1824.

The Collector of Benares, v. Baboo Uruk Sing.

The Collector appealed from this decision to the Provincial Court of Appeal for the division of Benares. On the 7th of March 1819, the Fourth Judge of the Court, considering the decision of the City Judge to be correct and proper, passed an order affirming it with costs.

The appellant being still dissatisfied with these decisions, presented a petition to this Court praying the admission of a special appeal on the 11th of November 1820, which was admitted accordingly. On the 19th of November 1822, the appeal came on before the Third and Officiating Judges (S. T. Goad and W. Dorin), when the whole of the proceedings of the City and Provincial Courts, and the papers filed by the parties in this Court were read, and the case was postponed for consideration. On the 25th of the same month, the *Vakeel* of the appellant was ordered to file answers to the following queries: Do the officers of Government consider the sum of 8,042 rupees, the annual *jumma* demandable from the respondent, to be the perpetual *jumma* of the talook Soorhye Kooroop; or do they consider that the perpetual settlement of that talook has never been and still remains to be made? It appears that the former *Moostajuree* settlement included the whole of the Mofussil assets, without any deduction being allowed to give a profit to the zemindar or farmer; if then the officers of Government consider that the perpetual settlement has not yet been made, and that the sum of 8,042 rupees *per annum* is still demandable from the respondent, and if the deduction of ten *per cent* and the expences of collection is erroneous, is any deduction to be allowed to the zemindar as profit, or not?

On the 17th of December 1822, the *Vakeel* of the appellant filed the following answer: The settlement of the talook aforesaid was not made with Baboo Roop Sing, in the time of Mr. Duncan, in the year 1202, F. S., in the mode required by section 22, regulation 11, 1795, as his zemindaree; but the talook was delivered over to him at a *jumma* of 8,042 rupees, as *tehsildar*, and the sum of 912 rupees, 13 anas, was allowed to him from the *jumma* as *dehyek* and *bhuray*, that is, an allowance of ten *per cent* as profits, charges of management, and charges of remittance, and for no other reason; when the *dehyek* and *bhuray* were no longer allowed by Government to the *tehsildars*, Government became entitled to receive the amount of the said deduction, or rather, the full amount of the *jumma* without any deduction. With regard to the perpetual settlement, or a new one, that point is not under investigation. The plaintiff sued for a deduction from the *jumma*, which he agreed to pay, and such deduction cannot be allowed. If he has any objection to make against the settlement, let him represent it to the Governor General in Council, who will pass whatever orders he may think fit on the case. It is the custom in the province of

1821. Benares for the zemindars to pay the full amount of rent of their zemindarees, according to the *jumma* established under the regulations. No *malikana* is allowed to them, nor is there any mention made of *malikana* in the regulations applicable to the province of Benares. Let the *jumma* be fixed at 8,042 rupees *per annum*, or let there be a new settlement. The respondent is not entitled to *malikana*.

The Col-
lector of
Benares, &c.
Baboo Ul-
ruk Sing.

On the 15th of January 1823, the case came on again before the same Judges, who, after perusing the answer filed by the *Vakeel* of the appellant, passed a decree to the following effect: The original object of the respondent was to prove his right to hold the talook Soorhye Kooroop at a perpetual and fixed annual *jumma* of 7,129 rupees, 14 anas, 3 pie, under a *pottah* granted by Mr. Rutledge, formerly Collector of the Zillah, and bearing date the 8th *Shaban* 1208 F. S. It appears that after the death of the father of the plaintiff a *pottah* was granted to the plaintiff by the Collector aforesaid, purporting to be confirmatory of a zemindaree *pottah* in his father's favour at the same rent. The *pottah*, however, which in 1202 F. S., was granted by Mr. Duncan to Roop Sing, the plaintiff's father, is not a *pottah* conveying the right of a zemindar; but a *tehsildaree pottah*, granted in conformity with section 15, regulation 11, 1795, and authorizing a deduction of *dehyek* and *bhuray* from the amount of the *jumma* entered in the said *pottah* in favour of Roop Sing, as *tehsildar*. It also appears that previous to this, namely, in the year 1196, F. S., a *Moostjuree pottah* was granted to Roop Sing for four years, commencing with that year, at a *jumma* of 8,001 rupees, and that during this time a suit was instituted against him by a person who claimed possession of the zemindaree, and subsequently dismissed. Hence it is clear that the *pottah* granted by Mr. Collector Rutledge is null and void; for when the office of *tehsildar* was abolished, their fees, viz. the *dehyek* and *bhuray* were resumed by Government. Moreover, the *pottah* granted, as above stated, by Mr. Collector Rutledge is a zemindaree *pottah*; as therefore that gentleman had no authority to grant such a *pottah*, and as it appears that it was never confirmed by the Board of Revenue, it is not sufficient, under the regulations in force, to give a claim to a perpetual settlement. On consideration of all these circumstances, the above-named Judges of the Court of Sudder Dewanny Adawlut recorded the following opinion: The claim of the respondent to the perpetual settlement of the said talook, at an annual *jumma* of 7,129 rupees, 14 anas, 3 pie, on the strength of the *pottah* produced by him, is not established. Although it appears from the pleadings filed by the appellant in this Court, that it is not the intention of Government to claim from the respondent a larger sum than 8,042 rupees as the annual *jumma* of talook Soorhye Kooroop, so long as the respondent shall be willing to pay that sum, yet, as the settlement of the talook has never been completed in the mode laid down in the regulations, the respondent is at liberty, if he conceive it to be to his advantage, to apply for a new settlement. It does not appear how the *jumma* was fixed at 8,042 rupees, or whether any deduction from the *Mofussil* assets was ever made in favour of the *Malgoozar*. It is therefore

ordered and decreed, that the decision of the Provincial Court for the division of Benares, dated the 7th of March 1819, which confirms the decision passed by the Judge of the city of Benares on the 7th of May 1817, be amended, and that the claim of the plaintiff for a deduction in his rents be dismissed. The plaintiff is, however at liberty to apply for a new settlement if he thinks proper to refuse to pay the *jumma* demanded by Government. If he be willing to pay the *jumma* demanded by Government, viz. 8,042 rupees, 11 anas, from the date of this decree, that *jumma* shall, according to the consent expressed by the officers of Government be considered as the fixed *jumma* of the talook to be held as a *mokurreree* tenure. As the present action is founded on a pottah granted by the Collector to the respondent, although the grant of the said pottah was erroneous, the suit cannot be considered as vexatious and unfounded, inasmuch as the *jumma* must have appeared to him to be correct. It was further ordered that each party should pay their respective costs in the three Courts.

1824.

The Collector of Benares, v. Bābho Ul-ruk Sing.

After this decision was passed, the respondent presented a petition to the Court, on the 16th of April 1823, praying for a review of judgment, in order that the word "*zemindaree*" might be entered in the decree of the Court, instead of the words "*mokurreree* tenure."

The appellant also, on the 26th of November 1823, presented a petition for a review of judgment to the following effect: It is stated in the decree of the Court, dated the 15th of January of the present year, that if he (the respondent) be willing to pay the *jumma* demanded by Government, viz. 8,042 rupees, 11 anas, from the date of this decree, that *jumma* shall, according to the consent expressed by the officers of Government, be considered as the fixed *jumma* of his talook." But no promise is to be found in the petition of appeal, and other papers filed by Government in the case, that Government will not make a new settlement or encrease the *jumma* of the land in question; on the contrary, it was stated that if the plaintiff had any objection to make against the settlement, he was at liberty to represent such objection to the Governor General in Council, who would pass whatever orders he might think fit. Such an order as had been passed being detrimental to the rights of Government, the appellant expressed a hope that a review might be granted, in order that the intentions of the Court on the aforesaid points might be clearly and distinctly stated, and that Government might act according to such decision.

A review of judgment having been granted, (the Judges who passed the decree being then absent from ill health,) on the petition of the appellant, for the reasons above stated, the case came on again before the Second Judge (C. Smith) on the 14th of June 1824, whose opinion was expressed in favour of altering the wording of the former decree, and erasing the following sentence from that decree: "if he (the respondent) be willing to pay the *jumma* demanded by Government, viz. 8,042 rupees, 11 anas, from the date of this decree, that *jumma* shall, according to the consent expressed by the officers of Government, be considered as the fixed *jumma* of his talook," and substituting the final order following: "it is finally ordered and decreed, that the decision of the Pro-

1824. v. The Collector of Benares, v. Bahoo Uruk Sing.

vincial Court for the division of Benares, dated the 7th of March 1819, which confirms the decision passed by the Judge of the city of Benares, on the 7th of May 1817, be amended, and that the claim of the plaintiff for a deduction in his *jumma* be disallowed. The plaintiff, however, is at liberty to apply for a new settlement, if he think proper to refuse to pay the *jumma* demanded by Government. If he consent to pay the amount of *jumma*, which shall, after due consideration, be fixed by the officers of Government, that *jumma* shall be considered as the fixed *jumma* of his talook. Should he refuse to pay the rent which the officers of Government may fix, Government is at liberty to act according to the rules laid down in the regulations for those cases in which the zemindar may not accede to the terms offered by Government. As the present action is founded on a pottah granted by the Collector to the respondent, although the grant of the said pottah was erroneous, the suit cannot be considered as vexatious, &c."

Moonshee Ameen Oodeen Ahmud, the Government Pleader, and Moulavee Nyamat Alee, the *vakeel* of the respondent, being in attendance, the proceedings held on the review, which were laid before the Third and Fifth Judges (J. Shakespear and W. B. Martin, they having joined in the order for admitting it on the 24th instant) and which were postponed for further consideration, were again brought forward before the abovementioned Judges, who expressed their concurrence in the opinion of the Second Judge, as far as related to the proposed omission in the former decision of the words quoted by the Second Judge. With regard, however, to the manner in which the final order should be drawn up, they deemed it sufficient to amend the decrees of the City and Provincial Courts, and to allow the plaintiff, if he were dissatisfied with the *jumma* demanded from him, to apply for a new settlement. The plaintiff had sued, they observed, merely to obtain a remission from the *jumma* which he was called upon to pay, and as that remission could not be granted, it was sufficient to pass an order to that effect, under which the parties might act according to the rules laid down in the regulations for their guidance.

Under these circumstances, it was finally ordered and decreed that the decision of the Provincial Court for the division of Benares, dated the 7th of March 1819, which confirms the decision passed by the Judge of the city of Benares on the 7th of May 1817, be amended, and that the claim of the plaintiff for a deduction in his *jumma* be dismissed, but that the plaintiff be, however, at liberty to apply for a new settlement if he think proper to refuse to pay the *jumma* demanded by Government. &c. &c.

The parties were made liable for their respective costs, and one fourth of the regular fee was ordered to be paid by the parties respectively to their *vakeels* for their trouble in conducting the review.

MUSSUMMAUT TARA MUNEE DIBIA, Appellant, • 1824.

versus

DEV NARAYUN RAI and BISHEN PERSAUD, Respondents. July 10th.

THIS was an action brought by Dev Narayun Rai, one of the present respondents, on the 28th of August 1819, in the Provincial Court of Dacca, against the appellant, to obtain possession of a three ana share in the pergunna of Bhul, situate in the district of Dacca Jelalpore. The *jumma*, estimated at thrice its actual amount, being 14,837 rupees.

In the case of an adoption made by a widow without having obtained the consent of her husband, or in which the adopted son shall not have been delivered over to her by either of his parents, but only by his brother, the Court will not hold the adoption valid, and if a son legally adopted, shall, being of age, execute an agreement, acknowledging the validity of his right to depend on his performance of certain conditions, his infraction of those conditions will be held to nullify his right.

The plaintiff's claim stated, that of Indra Narayun Rai, formerly sole proprietor of a nine ana share in the aforesaid pergunna, there had been three sons, Chunder Narayun Rai, Becha Narayun Rai, and Keerut Narayun Rai, whose representatives, Raj Narayun Rai, Mussumaut Surda Dibia, and Lok Narayun Rai, had common possession of the property, and lived together on the family inheritance; that the first of these, viz. Raj Narayun Rai, died in 1198 B. S., leaving his wife, the defendant, authorized to adopt a son; that she had accordingly, in 1205, B. S. adopted the present plaintiff, then five years old, conformably to the manner directed in the *shasters*; and investing him in 1207 B. S. with the Brahminical thread, had set aside for his support the mouza of Rajnugur, and afterwards solemnized his marriage at considerable expence; that his adopting mother, the defendant, had, by a decree in an action which she had brought while he, the plaintiff, was yet a minor, against Mussumaut Subd Iswuree (who had married the son of Keerut Narayun Rai aforesaid), got a three and half ana share of the zemindaree awarded to her; that when the said Subd Iswuree was about to appeal to the Sudder Dewanny Adawlut against that decision, his mother, to avoid the necessity of any further maintenance of the suit, had, without his knowledge, consented to a compromise, and giving up to Subd Iswuree a one ana, three gunda, one kowrie share of the aforesaid three and half ana share, had reserved the rest for herself. entering a *razeenama* in the Court; that on this, he, the plaintiff, being of age, had petitioned the Sudder Court to prevent the above arrangement, and was directed to institute a suit in the Civil Court; that he had in consequence done so for the three and half ana share aforesaid, against his adopting mother. Subd Iswuree and Goluk Narayun Rai her son; but finding that the decision of the Court in the appeal of Mussumaut Subd Iswuree *versus* Gunga Persaud and

INDRA NARAYUN RAI,

<p>Chunder Narayun Rai, A daughter married to Oodye Narayun Rai, Raj Narayun Rai, married Tara Munee Dibia, appellant. Alleged adopted son, Dev Narayun Rai, respondent.</p>	<p>Becha Narayun Rai, married Mussumaut Surda Dibia, and had no son by birth or adoption.</p>	<p>Keerut Narayun Rai, Lok Narayun Rai, married Mussumaut Subd Iswuree, Goluk Narayun Rai.</p>
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1824. others, had assigned, of the whole nine ana share, two thirds to the said Goluk Narayun, and only a three ana share to his, the plaintiff's adopting mother, he had withdrawn that former plea, and entered the present, omitting any mention of the portion of Beehā Narayun, whose property on the death of his wife (for he had no children) devolved on Goluk Narayun Rai, who, as nearest of kin, had performed his *sraddha* or exequial ceremonies, and suing only for the share belonging exclusively to his father.

Mossum-
mant Tara
Munee Di-
bin, v. Dēv
Narayun
Rai and
Bishen Per-
saud.

The defendant replied, that she had never received permission from her husband to make an adoption either orally or by writing : but that when Subd Iswuree had brought an action against her, Purmanud, a Brahmin, her family Gooroo and her agent, had advised her to support her case by the expedient of an adoption : and taking her with him to Dacca, had adopted the plaintiff (whose father was dead), contrary to all legal rules, from his brother Damoodur, without the attendance of her (the defendant), her relatives, or the family priest (*purohit*) ; that it was clear that one brother possessed no power to give away another brother in adoption ; that had she, as it was pretended, obtained permission from her husband, she never would have delayed till seven years after his death to exercise her right ; that although by the advice of the aforesaid Brahmin, she had given the mouza of Rajnugur for the plaintiff's maintenance, still that property remained, though in the plaintiff's name, in her (the defendant's) hands, and on the admission, that at the time when the plaintiff was in friendly terms with her (the defendant) she had defrayed the expences of his marriage, &c. still such payments could not substantiate in any way his claim of adoption ; that the plaintiff had, on the 23rd of Poos 1224 B. S., written an agreement to the effect, " That she, the defendant, should be considered and professed to be owner of the land during her life-time, and after her death the plaintiff should take her place, and that, should the plaintiff recede from his agreement by bringing any action for the land during the defendant's life time, his claim to any interest in it should be cancelled, whether of inheritance or otherwise," and that lastly, the present action was a direct infraction of the conditions of that agreement.

A petition was presented by a man by name Bishen Persaud Das, praying to be associated with the plaintiff in his plaint, on the ground of his having bought two thirds of the contested land. The prayer was allowed, and his name entered accordingly. The rejoinder of the plaintiff contained a simple denial of the allegation of the defendant, that he had written an agreement of the above mentioned nature.

The decree of the Second Judge of the Provincial Court, dated the 21st of September 1820, recited, that it was clear from the evidence and documents on the part of the plaintiff, that in adopting the plaintiff she had performed all the necessary legal conditions ; that in the case of the defendant *versus* Subd Iswuree, she had stated in her rejoinder that she had adopted the plaintiff with the consent of her husband previously received, and conforming in every point to the directions of the Hindoo law ; and as her present assertions could not be trusted to, that former statement was of sufficient force to confirm the legality of the adoption ; that the

bond of agreement, produced on the side of the defendant, was open to many suspicions; but even admitting its accuracy, it did not militate against the plaintiff's right, being in fact rather corroborative of it, as it was executed evidently on a presumption of a prior valid adoption; that therefore the defendant had no claim beyond that of mere maintenance from the plaintiff, in whose favour a one ana share of the zemindaree was awarded, the remaining two ana share being held to belong to Bishen Persaud. The defendant, dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut. A petition of Goluk Narayun Rai was entered and ordered to be filed on the 2nd of September 1823, the contents of which were detailed in the judgment given by the Second Judge of the Court (C. Smith), and which was to the following effect: That on an inspection of the proceedings of all the suits connected with the estate, part of which was now contested, as well as of those immediately relating to the impending case, it appeared that the claim of the respondent must be held void. For the agreement bearing date the 23rd of Poos 1224, B. S. was established by abundant evidence; and on the admission of the validity of that agreement, even although the adoption had been strictly legal, the respondent could have no claim during the appellant's life-time, except for the sufficiencies of maintenance; but that the alleged adoption did not seem to the Court to be valid, because it was proved by the evidence that it had been made after the death of the respondent's father, neither of the parents of the respondent, but only his brother, having given him away. That, moreover, the consent of her husband was requisite to legalize an adoption made by his wife; and it had not been shewn in the present case that any such consent had been given. Certainly, the giving of it could not be considered established by the simple assertion of the appellant at the time of the adoption, that she had received it; the more so, as her subsequent statements induced a suspicion of her having had an interested purpose in making such an assertion; that lastly, the consent of others who had a claim to the land was necessary to confirm the adoption; others, such as Goluk Narayun Rai, who had stated in his petition, that in default of the adoption the estate belonged to him.

1824.
Mussum-
maut Tara
Munee Di-
-ah, v. Dev
Narayun
Rai and
Bishen
Persaud.

The case coming to a hearing next before the Third Judge of the Court (J. Shakespear), on the 8th, 14th and 15th of January 1824, the following questions were put to the Pundits of the Court, and answers received.

Question 1st.—If a woman asserting herself to have received permission from her husband to adopt a son, shall make such adoption, and the granting of such permission be not supported by any other proof than that assertion affords, is the adoption legal?

Answer 1st.—Such adoption is not legal.

Question 2nd.—If an adopted son executes an agreement of the following purport, that his mother is to remain in possession of the property during her life-time, and he is to inherit after her only on the following conditions: that should any serious difference occur between his mother and himself, he is to lose all his rights, and his adoption to be held void, does such a document

1824. on the occurrence of such difference confer any legal right on the mother?

Mussum-maut Tara Munce Dibin, v. Dev Narayun Rai and Bishen Persaud. *Answer 2nd.*—It does confer such right, because the proprietor of any possessions may dispose of them as he pleases.

A reference was at the same time made by the Court to the Judge of the city of Dacca, forwarding a copy of the engagement originally made by Dev Narayun Rai, and directing that copy to be compared with the original, as entered in the records of the registry, and the oral evidence of as many of the witnesses to it as might be living, to be taken and transmitted to the Court. It was also desired, that the answers of those witnesses to any questions proposed by Goluk Narayun Rai should be included in the official returns.

On the receipt of these a definitive judgment was given on the 10th of July 1824, reciting that there existed nothing like sufficient proof to establish the fact of permission to adopt having been given to the appellant by her husband. Therefore, and for the reasons stated in the decree of the Second Judge, it was ordered that the decision of the Provincial Court of Dacca should be reversed, and judgment be passed in favour of the appellant with costs.

1824.

THE COLLECTOR OF BENARES, Appellant,
versus

MUHA NARAIN SINGH, Respondent.

July 4th.

On claim by the grandson of the original grantee to certain rent free lands and a money allowance conferred as *jageer* on his ancestor by the former Rajas of Benares and confirmed by Messrs. Hastings and Fowke, held that the land tenure should endure under such confirmation, but that the money al-

THIS was an action preferred by the respondent, *in formâ pauperis*, against Government, in the Benares Provincial Court, on the 2d of January 1818, to recover the freehold tenure of mouza Buraeen, in pergunna Kuttetur, and to establish his right to an annual allowance of two thousand one hundred rupees. The yearly produce of Buraeen was estimated at one thousand nine hundred rupees, making the eighteen fold amount of both items seventy-two thousand rupees.

It was stated that the lands and the money allowance had been conferred on the plaintiff's grandfather, Rao Behadoor Singh, and that person's mother, as free *jageer*, in exchange for mouza Kootwa, commonly called Kupuldhara, and the five *per cent* duties levied at Mirzapoor, by the respective grants of the Rajas Bulwunt and Cheyt Singh, Mr. Hastings, and Mr. Fowke; but that, when the plaintiff, in the year 1218, F. S., on the death of his father, who had regularly succeeded to the whole, put in his claim for the annuity, the Collector, after an enquiry of some years duration, received orders from the Board, on the 14th of November 1815, to discontinue the allowance, and place the estate under sequestration; that on tenders being invited for a settlement, he (Muha Narain) after remonstrating with the Collector against the proceeding, on the ground that the terms of his grant involved an hereditary tenure, urged his right, under regulation 41, of 1795, to be continued in possession as proprietor on paying an annual revenue of one half the produce; and meeting with no attention,

appealed to the Commissioners at Furruckabad, but was eventually directed to seek his remedy in Court by Mr. Deane, the Commissioner for Behar and Benares, to whom his case had been transferred. 1824.

The answer given in by the Collector was in purport, that the plaintiff's father had kept possession of the *jageer*, on the demise of Behadoor, without the knowledge of Government, and that he (the Collector) on ascertaining the fact of Munsa Ram's death, sent in a report of the case accompanied by the *sunnuds* to the Board, and received an answer dated the 13th of October 1815, reciting, that the several grantees, whether Rao Behadoor Singh, his mother, or his son Munsa Ram (*alias* Nundkishore) being dead, and the lands being expressly denominated *jageer*, and the pension and money compensation for resumed *jageer*; the grants were clearly not hereditary; that the renewal of them therefore on the demise of Rao Behadoor Singh by the late Collector, on his own authority, without reference to the sanction of Government, was evidently unauthorized and invalid, and directing him to suspend payment of the allowance and to resume the lands; that as no person was able to make out a proprietary right to the mouza, he had concluded a settlement of it in farm with Sheo Lal and others, and had put them in possession; and lastly, that the suit was now barred by the 6th section of regulation 5, 1803.

allowance should be discontinued, no mention of its being hereditary having been made in the original grant.

Sheo Lal and his copartners had been named in the plaint as defendants, and were served with the usual notice, but none of these persons gave in any answer. The claim was decreed with costs, on the 5th of September 1820, by the Senior Judge of the Patna Court, who grounded his decision on the uninterrupted succession of Munsa Ram and the plaintiff, and on the confirmation of Raja Cheyt Singh's grant, which the Governor General (Hastings) had signified in writing on the margin of the original grant; and as the right of Rao Behadoor's descendants were guaranteed in express terms by the grant thus confirmed, and also by that of Rajah Bulwunt Singh, the question of hereditary tenure was considered to have been set at rest under the spirit of the 2nd and 3d sections of regulation 41, 1795. Government were adjudged to pay up all arrears of the pension, and to account for the mesne proceeds of the estate.

On appeal from the above order, as far as regarded the pension or money allowance, to this Court, an application was submitted on behalf of Muha Narain for permission to reply *in forma pauperis*, which was disallowed. The Officiating Judge (J. Ahmuty) in a proceeding held on the 22d of June last, remarked that although the estate and pension were mentioned together in the *sunnud* of Mr. Hastings, and provision was made for the regular payment of the latter by that of Mr. Fowke, there was no like notice of the pension in the two grants from the Rajas of Benares which had been produced; that the respondent had not, in fact, brought forward a single document to show that the allowance was hereditary, as he would doubtless have done if any such had existed; and that there appeared no reason why the allowance had been fixed by the *sunnuds* of Messrs. Hastings and Fowke at 2,100 rupees *per annum*, as it was evident, from the original grant, that the sum received by

1824. Rao Behadoor from the Benares Government in compensation for mouza Kupuldhara, &c. had fluctuated from fifteen hundred to three thousand rupees. Mr. Ahmuty, therefore, pronounced his opinion, that the money pension had been very properly discontinued; but considered that the parties ought to be ordered to pay their respective costs, as the respondent could not be blamed for having maintained his claim to a right of which his father had so long held the undisputed enjoyment.

The Collec-
tor of Be-
nares, v.
Muha Na-
rain Singh.

The Third Judge (J. Shakespear) before whom the cause was next brought to a hearing, concurring entirely in the above opinion, a final order was passed, amending the decree of the Patna Provincial Court in conformity thereto.

1824.

RANEE INDRANEE, (Mother and Guardian of RAMNATH GURG, a minor), Appellant,

versus

July 1st.

RAM KOOMAR BURM, Respondent.

An *ikhar-nama* or written acknowledgment from the defendant to the plaintiff, that the latter is proprietor of a portion of the estate belonging to the former, held to be good evidence of the transfer, although no consideration was proved; an attempt by the defendant to prove a counter *ikhar-nama* by the plaintiff having failed.

THIS was a suit instituted by Raja Juggunnath Gurg against the respondent, on the 15th of August 1815, in the Calcutta Provincial Court, to recover possession of a three ana share in the zemindaree of pergunna Mysadul, &c. in zillah Midnapore: suit laid at 80,465 rupees, amount of the triennial assessment.

The plaint set forth, that the defendant's father, Bulram Burm, was the agent of Raja Anund Sal Onpadiah, the husband of the late Ranee Jankee; that, on his death, Nund Koomar Burm, the defendant's elder brother, became Naib Dewan, and after his decease the defendant succeeded to the service of the Raja, and continued therein till the 7th Poos 1220, *Umlee*, receiving a monthly salary of 200 rupees, an allowance of about 400 rupees for his domestic expences, and 207 rupees *per mensem* as the salary of his nephew Hureehur Burm; that, besides this, he had spent a great part of the profits of the zemindaree, salt, *moshairah*, &c. and had never, from the commencement of the suit about the zemindaree, furnished an account of receipts and disbursements while in the service of Gooroopershaud Gurg, the plaintiff's half-brother, and Massumaut Mohunterah his step-mother: that, in consequence, the plaintiff sued in the Dewanny Court of the above zillah to recover those accounts, as well as the blank papers bearing the seal and signature of himself and of former zemindars, and that the cause was still pending; but on the zemindaree cause coming before the Sudder Dewanny Adawlut, on the appeal of Motee Lal Panre, and because all the concerns of the estate were under the controul of the defendant, the plaintiff consented to be guided by his (the defendant's) advice; that accordingly, when the defendant foresaw that the decree of the Provincial Court would be confirmed by the Sudder Dewanny Adawlut he recommended the plaintiff to hold the share in dispute fictitiously in his (the defendant's) name, alleging that it would be easier by that means to find sureties in case of suing or being sued by any one,

and persuaded him to sign an *ikrarnama*, or conveyance for the above share, written in the Bengallee character, and dated the 5th of *Aghun* 1214, *Umlee*; that on the 1st of *Magh* 1214, after the Sudder Dewanny Adawlut had passed a decree in favour of the plaintiff, he executed another deed confirmatory of the former one, and gave it to the defendant, receiving from him a written acknowledgment regularly witnessed and signed by him, declaring that the property in dispute stood fictitiously in his name, and that he was only the ostensible proprietor; and that afterwards the plaintiff obtained possession of the entire estate under the decree of the Sudder Dewanny Adawlut, and on the 7th of *Jeth* 1215, executed a power of attorney in favour of the defendant, authorizing him to receive the money accumulated while the property was under attachment; that accordingly the defendant petitioned the Collector to erase the name of Motee Lal and substitute that of the plaintiff, for the whole zemindaree, and that after this was done, the defendant made the plaintiff sign another *ikrarnama* on the 10th of *Assar* 1215; that afterwards the plaintiff, although he had entered the name of the defendant jointly with his own in the Collector's books, for the property in dispute, fixed the office for collecting the revenue of the whole zemindaree in one place, paid the expences of it, and transmitted the whole amount of the assessment at once to the Collector's office; that on the defendant's refusal to furnish an account of income and expenditure when demanded, the plaintiff dismissed him from his situation, upon which the defendant, from motives of enmity sued for possession of the property in question, under regulation 6, of 1813, producing all the above documents as his title deeds; that as the Zillah Judge, on the 6th of February 1814, had summarily awarded possession to the defendant, and referred the plaintiff to a civil suit if he had any claim, on the grounds that the above portion was claimed as a *benamee* or fictitious tenure, and as this judgment had been confirmed by the Provincial Court, the plaintiff had no remedy left but the institution of a civil suit, which he now preferred accordingly.

The defendant, in reply, declared that the plaintiff's allegations were entirely false, and that the following was the true state of the case :

On Motee Lal laying claim to the zemindaree of pergunna Mysadul, &c. after the death of Mussummaut Ranee Jankee, he had been at great trouble and expence to invalidate the claim by proving the title of the opposite party, and for this purpose had produced many indubitable documents from the Government records. While the cause was pending before the Sudder Dewanny Adawlut the present plaintiff succeeded, as heir, to Mussummaut Mohunterah, and executed the first *ikrarnama*, dated the 5th of *Aghun* 1214, *Umlee*. Subsequently, when the decision of the Provincial Court was confirmed by the Sudder Dewanny Adawlut, he executed the second *ikrarnama* on the 1st of *Magh* 1214, which was to the same effect as the former one, and subsequently put him (the defendant) into possession, in conformity to the provisions of the latter deed, of the three ana share specified, with the privileges annexed to it, and on the 10th and 11th of *Assar*

1824.

Ranee Indranee, v. Rani Koonar Burua.

1824. 1215, executed and gave to him two *ikrarnamas* confirmatory of the former ones, and in the presence of the Judge of the twenty-four pergunnas acknowledged the authenticity of all the four documents. When the defendant petitioned to have his name entered for the above share, the plaintiff presented two petitions to the Collector signifying his acquiescence in the proposed arrangement; accordingly the Collector entered his name in the books and issued a *purwanna* ordering the Ryots to pay the revenue to him. Subsequently the plaintiff himself petitioned that 8,888 rupees, 8 anas, 12 pie *per annum* might be paid to the defendant, as being a three ana portion of salt *moshairah*, derived from the zemindaree of the *Numuk Mehals*; upon which the Judge wrote to that effect to the Salt Agent at Tumlook, and the defendant accordingly obtained possession of the above portion, received the *moshairah* from the Salt Agent, and paid the revenue through his agents to the Collector by monthly instalments, as could be proved by the Collector's report, the petition of the plaintiff, receipts, and many other documents. It was extraordinary that the plaintiff had only mentioned in his plaint the two *ikrarnamas* dated 5th of *Aghun* and 1st of *Mayh*, and had altogether omitted to notice the two dated the 10th and 11th of *Assar*, which clearly proved the falsity of his statement, that the lands in dispute stood in a fictitious name. In his petition, however, presented to the Zillah Court when the *suzawul* was appointed to attach the lands, he acknowledged the *ikrarnama* dated the 11th of *Assar*. The Zillah Judge in the year 1221, ordered the defendant to be reinstated under regulation 6, of 1813, in the three ana portion in dispute (after he had been ousted by the plaintiff), his title having been established by incontrovertible proofs. This order was upheld by the Provincial Court, upon which the plaintiff became ashamed of his conduct, and wrote repeatedly to Moonshee Ameen Oodeen, a *vakeel* in the Sudder Dewanny Adawlut, requesting an amicable settlement. Accordingly the defendant went from Calcutta to Mysadul, where the matter was compromised, and the plaintiff executed on the 18th of *Jeth* 1221, three *ikrarnamas* regularly witnessed, signed, and sealed by himself, one setting forth, "that the defendant had been unjustly ousted from the above three ana share, and that the plaintiff relinquished all claim to it, being convinced of the justice of the decree passed by the Sudder Dewanny Adawlut, and would within a month petition for the partition of it, otherwise either party should have the power to do so;" another, declaring "that the plaintiff relinquished his right to call him to account for 109,000 rupees;" and the third, "promising that the plaintiff would make good upwards of 15,000 rupees, on account of the suit instituted by Huldur Arie against the Raja and against the defendant, and his nephew Hureehur Burm as his surety, for the recovery of the balance of an account;" and received from the defendant an *ikrarnama* granting a release for two lacks of rupees (due to him under bonds executed by the plaintiff in his own and fictitious names) with interest, and cancelling all his (defendant's) accounts down to the year 1220, against the plaintiff, on condition that the latter paid 32,000 rupees of that sum which were due to Mahajuns,

Ranee Indrance, v.
Ram Kooner
Burm.

and make good the mesne profits during the period of his (the defendant's) dispossession. The plaintiff, moreover, presented to the Collector and Magistrate of the Zillah a settlement, under his seal and signature, reciting the terms of the adjustment and the relinquishment of mouza Sond Jora, which had been given to him (the defendant) for religious purposes. The injustice of the suit now preferred by the plaintiff would be evident by reference to the proceedings of the Collector and the deeds executed by the plaintiff, and by an enquiry into the truth of the defendant's statement.

1824.

Ranee Indranee, v. Ram Kowmar Burm.

The plaintiff in replication denied that he had gone to the Judge of the twenty-four pergunnas, as asserted by the defendant, or that he had written any letter to Moonshee Ameen Ooddeen in which he relinquished the estate in dispute to the defendant. He further stated, that he knew nothing of the *ikrarnama* dated 11th of Assur 1215, which must therefore have been forged, and that the defendant had presented in his (plaintiff's) name a petition to the Collector, specifying the particulars of the amicable arrangement, through his nephew Hurreelur Burm.

The defendant in rejoinder repeated his former allegations.

On the 18th of December 1821, the Second and Third Judges of the Provincial Court passed a decree to the following effect: The plaintiff's claim is founded on the *ikrarnama* executed by the defendant, setting forth that the share in dispute was entered in a fictitious name, with a view to facilitate the giving of security into Court in case of necessity. The reason here assigned, however, is absurd, for if the security offered by the 13 ana share enjoyed exclusively by the plaintiff was at any time refused as insufficient, much more would the defendants 3 ana portion be objected to. It is moreover usual, in cases of this nature, for the engagements both of the real and the fictitious proprietor to be executed before, and witnessed by the same persons; inasmuch as it is supposed and intended to be a private transaction, whereas, if the circumstance is publicly known there is no use in the *benamee* or fictitious transaction. In the present case the deeds of the parties are witnessed by different persons. The Court could not believe the excuses alleged by the plaintiff for not producing for six years the above *ikrarnama*, notwithstanding the repeated orders of the Court for the production of that deed, and for summoning the witness Mokund Ram Ghose, whom he named to prove that he had entrusted the *ikrarnama* to his agent Oochubanund Ghose for the purpose of being presented to the Midnapore Zillah Court, which he had neglected to do and was since dead, and that when it was demanded from his son (the said Mokund Ram Ghose) he had promised to search for it but had never produced it. When the Court refused to admit these excuses, and further consideration of the case was deferred till Mokund Ram Ghose should appear and depose on oath, the plaintiff did not appear himself, but sent the above individual, who of his own accord produced the *ikrarnama*. The Court could not attach credit either to his evidence on that occasion or to the document itself. It appeared, moreover, that there was no suit pending in the Midnapore Zillah Court about the share in dispute at the time when the plaintiff asserts

1824. that he entrusted the *ikrarnama* to be there produced, and it is not probable that the plaintiff, if he possessed an *ikrarnama* of this nature, executed by the defendant, which it might have become necessary to produce before any Court of judicature, would entrust so important a paper, one on which his claim was founded, to the hands of an agent, after he was aware that the defendant had denied the execution of it: he would either have filed it in person or by his *vakeel* in the Court: although four of the plaintiff's witnesses have deposed on oath to their own and the defendant's signature to the above deed, it appears that the stamp (from the date of sale inscribed on the back of it) was sold on the 5th of January 1809, which corresponds with the 23rd of *Poos* 1215 B. S., while the 1st of *Magh* 1214, *Umlee*, which is the date of the execution of the above deed, corresponds with January the 13th, 1808, and accordingly the *ikrarnama* must have been executed nearly a year before the stamp was sold. The Court therefore had no doubt that it was a forgery, and did not consider the plaintiff's witnesses entitled to any degree of credit; on the other hand, it appeared evident, from the testimony of the witnesses adduced by the defendant, who had no interest or connection with the parties, but are officers in the service of Government, as well as from the documents produced by the defendant, that the plaintiff gave a 3 ana share of *pergunna* Mysadul, &c. with the privileges belonging to it, including the salt *moshairah*, to the defendant, in consideration of the trouble he had been at formerly in the conduct of suits in the Zillah and Provincial Courts as well as in the Sudder Dewanny Adawlut, about the above zemindaree, between Rajah Motee Lal and Ranees Mohunterah and others of the plaintiff's ancestors, and that the plaintiff put him in possession and substituted his name for his own for the share in dispute, and gave him a 3 ana share of the salt *moshairah* allowed by Government, in conformity to the provisions of the *ikrarnamas* dated 18th of *Jeth* 1221; that the defendant obtained possession of the share in dispute, under regulation 6, of 1813, according to the decree of the Zillah Court, after having been ousted by the plaintiff; that the above decree was confirmed by this Court; that the disputes between the plaintiff and the defendant were settled; that the plaintiff relinquished his right to the share in dispute and presented a petition to that effect to the Magistrate and Collector of the Zillah; that no deed had been executed by the defendant; and that there was no mention of the *benamtee* or fictitious tenure in the plaintiff's *ikrarnama* dated the 1st of *Magh* 1214. For these reasons the Court considered the plaintiff's claim to be entirely false and unjust, and the *ikrarnama* produced by him a palpable forgery. They therefore dismissed the suit with costs, and ordered the four witnesses who had deposed to the authenticity of the forged *ikrarnama* to be made over to the Magistrate for trial by the Court of Circuit.

On the death of Raja Juggunnath Gurg, which event happened after the passing of the Provincial Court's decree, Ranees Indranee his widow appealed to this Court. The case came to a hearing before the Fifth Judge (W. B. Martin) on the 29th of May 1824, who, after perusing all the papers and

pleadings of the parties, observed, that although it was not clearly and satisfactorily proved for what reasons the appellant's husband had given a 3 ana share of his zemindaree to the respondent, and although it was probable that the execution of the deed of transfer was effected through the influence which the respondent possessed over his mind, yet he had himself acknowledged the execution of it, and his statement with regard to having received an acknowledgment of its being a fictitious tenure had not been fully established. He was of opinion, therefore, that the claim preferred by the appellant's husband ought to be dismissed, and the respondent continued in possession of the 3 ana share in dispute, but that the order of the Provincial Court for committing, on a charge of perjury, the four witnesses who had deposed to the *ikrarnama*, ought to be reversed, as there was some doubt with respect to the date of the sale of the stamp. Accordingly, with the concurrence of the Officiating Judge (Mr Harington) the decision of the Provincial Court was amended, and the appeal dismissed with costs.

1824.

Ranee Indranee, v. Ram Koomar Barm.

TARNEE CHURN and KALEE CHURN, (sons of
PARBUTTEE CHURN NAG, paupers), Appellants,

1824.
July 31st.

versus

MUSSUMMAUT DASEE DASEEA, (pauper), Respondent.

THIS was an action brought *in forma pauperis* by the present respondent against the present appellants in the Provincial Court of Calcutta, on the 5th of September 1811, to obtain possession of the property left by her husband, namely, various portions of land situate in the pergunna of Nukhera, the half of certain mansions, out-houses and tanks, also situate in that pergunna, and estimated at 410 rupees, the family jewels and furniture estimated at 461 rupees, and the sum of 3,400 rupees, being the half of two notes of Company's paper, with 2,499 rupees, half of the interest on the above sum for the space of 12 years from the month of *Jeth* 1206, B. S., till the month of *Sawun* 1218, B. S., the whole value of the property claimed amounting to 7,000 rupees.

A Hindoo of Bengal may lawfully convey all his property by a deed of gift to his brother, notwithstanding that he has a wife living.

The plaintiff stated, that her father-in-law, Ram Chundur Nag, had two sons, Parbuttee Churn Nag, and Doorga Churn Nag, her husband, to the former of whom their father had given a piece of Company's paper for 3,000 rupees, made out in his name, and to the latter another piece of Company's paper for 3,700 rupees, made out in his (Doorga Churn's) name; that the said Ram Chundur Nag had died in the year 1205 B. S., leaving his two sons as joint proprietors of the rest of his possessions: that of these, Doorga Churn Nag, husband of the plaintiff, died in the month of *Jeth* 1206 B. S., having some time before given over to her (the plaintiff) the Company's paper which he had received from his father, she being at the time of tender age; that on this Parbuttee Churn Nag, imposing on her ignorance and inexperience, had fraudulently taken the said note from her, and producing at the same time a

1824. forged will, professing to have been written by her husband, had demanded from her a release in full of his property; that on her refusing to give such a release, and appointing her father Manick Ram Mitr her attorney, the said Parbuttee Churn had kept her a prisoner within her house, and administered to her some noxious drugs which for the time deprived her of her reason; that he had also forcibly expelled her father from the place where she was; that although her father had entered a petition praying for redress in the Criminal Court of the twenty-four pergunnas, and given notice to the Treasury to stop the note, yet her brother-in-law had contrived to get the security cashed while she was yet labouring under the effects of the potions she had swallowed; that Parbuttee Churn died in the month of *Assin* 1217, B. S., and his sons the defendants had got the whole of the estate into their hands, and she now therefore sued to recover her rights.

Tarnee
Churn and
Kalee
Churn, &c.
Mussum-
mant Dasee
Dasee.

The defendants replied, that the plaintiff's husband had never, as was alleged, received the Company's paper from their grandfather Ram Chunder Nag; that, on the contrary, it so happened that it had never passed through his hands in any shape, for on their grandfather's death, their father, as his eldest son and manager of the family property, had retained it as well as the other in his possession; that the plaintiff's husband had, shortly before his death, influenced by a knowledge of the incurable nature of the disease with which he was afflicted, and by the circumstance of his having no son to continue the performance of the religious ceremonies connected with the spiritual welfare of the family, conveyed, by a deed of gift of the 2d of *Jeth* 1207, B. S., all his property to his brother (their father) except 500 rupees, which he reserved for his mother, and 300 for his wife (the plaintiff), the latter reservation to be confirmed only on the condition of the plaintiff remaining in his brother's house; that on the death of the plaintiff's husband, their father had caused the plaintiff to perform his exequial rites, and afterwards took the charge of her maintenance; that about this time Manick Ram Mitr, the plaintiff's father, forging letters of attorney as if made out in his name by the plaintiff, gave notice at the Treasury to stop the note, pretended to have been given by Ram Chunder Nag to the plaintiff's husband; that then the defendant's father was in consequence prepared to bring a suit in equity in the Supreme Court to obtain the money, when the plaintiff came to a compromise, denying the execution of any power of attorney in her father's favour, and causing, on the receipt of 900 rupees, a general release to be drawn up and entered in the Supreme Court on the 3d of July 1801; that an enquiry was then instituted regarding the notice which had been served at the Treasury by the plaintiff's father, the result of which, on the validity of the above deed of release being established, was that Parbuttee Churn Nag got the note cashed, and had held undisturbed possession of the money as well as of the other property for the eleven remaining years of his life.

The decree of the First Judge of the Court of the 11th of May 1815, was to the effect that the plaintiff should be nonsuited, on the following grounds, first, because the plaintiff had not entered

a plaint in any Court within twelve years from her husband's death, and her present suit therefore could not be investigated with reference to the jewels and other moveable part of the property; again, as the estimated value of the land and dwelling-houses did not amount to 5,000 rupees, an action to recover them came within the description of cases subject to the cognizance of a Zillah Court. The dismissal of her present suit, however, was expressly declared to be understood as leaving her entirely at liberty to prosecute her claim for the immoveable portion of the estate in a Zillah Court.

1824.

Tarnee Churn and Kalee Churn, v. Mussumant Dasee Dasce.

The plaintiff filed an interlocutory appeal to the Sudder Dewanny Adawlut from the above award, which was admitted on the 7th of March 1816, and the Judges of the Provincial Court were ordered to proceed with the investigation of the case on its merits *de novo*. The decree of the Officiating First Judge of the Provincial Court, framed on the receipt of that order, and bearing date the 26th of December 1820, set forth, that from a consideration of the evidence, and the *vyuvustha* of the Court Pundit, the deed of gift and general release which had been produced by the defendants had been shewn to be unworthy of credit and support, as being both unauthentic and illegal; that the claim of the plaintiff, therefore, ought to be maintained; and accordingly the whole property moveable and immoveable was decreed to her under the conditions prescribed by the Court Pundits, of living in the family of her husband and not disposing of the property to any other person by gift, sale, or otherwise.

The defendants, dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut. The case came to a hearing before the Second Judge (C. Smith) on the 8th and 9th of March 1824. The evidence of several persons mentioned by the appellants was ordered to be taken: and the following questions put to, and answers received from the Court Pundit.

Question 1st.—A Hindoo of Bengal, of the *Kayustha* class, dies leaving a wife and an elder brother. To which of these two does the inheritance of his property, moveable and immoveable, devolve?

Answer 1st.—To the wife, not to the elder brother.—*AUTHORITY*, The text of *Yajnyawalkya*, cited in the *Daya Bhaga*, “The wife and the daughters, also both parents, brothers likewise and their sons, &c.”

Question 2nd.—If that person, before his death, execute in favour of his elder brother a deed of gift of the nature of the deed in the present case, bearing date the 2nd of *Jeth* 1207, B. S., is his doing so held legal by the Hindoo law as applicable to Bengal?

Answer 2nd.—It is.—*AUTHORITY*, the text of *Nareda* cited in the *Daya Bhaga*, “Should they give or sell their own shares they do all that as they please, for they are the masters of their own wealth.”

Question 3d.—If of the above parties, the wife give to her husband's elder brother a general release of the same import as the paper dated 3d of January 1801, is the fact of her executing such a release conclusive against any claim she may subsequently

1824. advance, or is it still in her option to sue for the property left by her husband?

Tarnee Churn and Kalee Churn, v. Museum-mant Dasee Dasce. *Answer 3d.*—Such a fact is conclusive against any subsequent claim.—AUTHORITY, a text of the *Daya Tutwa*, "Property may be alienated owing to the indifference of the owner, but cannot be resumed at his pleasure."

Reference was likewise made to the Treasury, enclosing a copy of the receipt signed by the sub-treasurer, and dated 16th of January 1801, requesting that the original of the deed of gift deposited by Parbuttee Churn Nag in that office might be transmitted for the inspection of the Court; and to Mr. Blaquiére, of the Police office, in order to ascertain whether any person had been sent, as was alleged by the appellants, to take the deposition of the respondent with reference to the deed of release.

These matters being ascertained, the Second Judge proceeded to pass his decree, on the 20th of July 1824, reciting that the authenticity of the deed of gift and release had been established by the evidence which had been taken and forwarded by the Provincial Court and by the original deed which had been transmitted from the Treasury, although the reply of Mr. Blaquiére stated that no mention was found in the records of the Police of a person having been sent to take the deposition alleged; that the assertions of the respondent that she had been confined a prisoner in her own house, and deprived of her reason by the use of noxious drugs, was utterly unworthy of credit; and that lastly, the *vyuvusthas* of the Court Pundits proved the aforesaid deeds to be, on the presumption of their authenticity, strictly legal. He therefore recorded his opinion that the decree of the Provincial Court should be reversed. The case being ordered for a second hearing, which it obtained on the 31st of July 1824, before the Officiating Judge (J^r Ahmuty), and he concurring in the above opinion, a final decree was passed accordingly.

1824.
August 16th.

COLLECTOR OF ZILLAH RAJSHAHY, Appellant,

versus

RUGHOONATH NUNDEE and GHOLAUM MOORTUZA,
Respondents.

The plaintiffs sued to have two *turrufs* re-annexed to their estate on the plea that they were de-
pendant; rejected, on proof that they had been separated before

THIS suit was instituted by the former plaintiffs, Rughoonath Nundee and Shoojau Moohummud, against the appellant, and Sheikh Kumal Oodeen and Moohummud Tukkee, former defendants, to set aside the separation of two *turrufs*, named Hautcolly and Sunjirpore, from the pergunna of Bazoochup, in the zillah of Rajshahy, and to recover damages to the amount of 5,151 rupees. The plaint was as follows:

The aforesaid *turrufs*, appertaining to the above mentioned pergunna, the zemindaree of the plaintiffs, compose the de-
pendant talook of Sheikh Kumal Oodeen and Moohummud Tukkee the defendants, who, during the time of the former zemindars, as well as after, the plaintiffs had purchased the

said pergunna, paid their rents through the zemindar. The Collector, however, owing to a petition presented by the defendants, who had no right to claim any division of property, separated the aforesaid places from the pergunna of the plaintiffs, notwithstanding that a similar petition, before presented by the defendants, had been rejected by the Board of Revenue. As this occasioned great loss to the plaintiffs, they petitioned the Board of Revenue who ordered them to institute a suit against the defendants in the Civil Court, which they now did accordingly.

1824.

the plaintiffs purchase of the estate, and distinctly assessed by the Collector, and assessment confirmed by Government.

The Collector stated in answer to the plaint; that in the year 1204, B. S., the zemindaree of Maharaja Raj Kishen Rai Behadour was sold in liquidation of arrears of revenue, and the pergunna of Bazoochup, one of its talooks, was purchased by Ram Kishen Chowdry, Bishunnath Rai, Ram Mohun Chowdry, and Nitanund Sein. In 1207, B. S., after that Hautcolly and Sunjirpore had been separated as the independant talook of Gopaul Kishen Mujmoodar, at a *jumma* of 2,251 rupees, under the deed of sale and signature of Bishunnath Rai, as likewise that of Tanti Bund and others belonging to Opind Narain Chowdry, Rughoonath purchased the pergunna of Bazoochup of the aforesaid Nitanund Sein and Ramkishen Chowdry, deducting from the *jumma* of the said pergunna that of the several divided independent talooks, amounting in all to nine thousand five hundred and eighteen rupees. The division and allotment papers of the above talooks, separated in 1206, B. S., were sent for inspection to the Board of Revenue, and the several *jummas* assessed on them were approved of and confirmed by the Governor General in Council. The estates of Hautcolly and Sunjirpore were afterwards sold by Gopaul Kishen Mujmoodar to Moohummud Tukkee, in whose name the purchase was registered, but as the latter entered into partnership with Kumal Oodeen, the names of Moohummud Tukkee and Kumal Oodeen were both entered in the registry books. On this occasion the aforesaid Rughoonath shewed no opposition. Moreover, when Govind Chowdry, owing to a deed of gift executed in his favour by his grandfather Opind Narain Chowdry, petitioned to have his name entered as independent Talookdar of Tanti Bund, &c. in the pergunna of Bazoochup, he, the said Rughoonath, executed a writing or *ikrarnama* in favour of the petition, in which he stated that he had no wish or intention to interfere with the encrease or abatement in the *jumma* of the said talooks. Afterwards, Rughoonath sold half of his pergunna to Shoojau Oodeen Moohummud, one of the plaintiffs, so that both of their names were entered as proprietors, and the revenue had been paid accordingly.

Moohummud Tukkee and Sheikh Kumal Oodeen, after generally denying the truth of the plaint, answered as follows; Hautcolly and Sunjirpore, part of the zemindaree of Raja Bishennath Rai, the former zemindar of Bazoochup, were sold to Gopaul Kishen Rai Mujmoodar, commonly called Rajkishen Mujmoodar, at an annual *jumma* of 2,251 rupees. Afterwards they came into Moohummud Tukkee's possession, when he sold the half of them to Kumal Oodeen, and accordingly both their names were entered in the Collector's books; from which time the defendants have

1824.

Collector
of Zillah
Rajshahy,
v. Rughoonath
Nundee and
Gholaum
Moortuza.

been in possession of the aforesaid estates and have regularly paid the revenue of Government. The separation of the *turrufs* was made under the sanction of the Governor General in Council, and by the immediate order of the Board of Revenue, the former zemindars and Rughoonath, never before the present time having shewn the least opposition to the arrangement. The plaintiffs now declare that the aforesaid places are merely dependencies on their estate, but this assertion remains to be proved. The rest of the answer was similar to the Collector's. Upon the death of Shoojau Oodeen Moohummud (one of the plaintiffs), his heirs, Gholaum Moortuza, carried on the suit, which upon investigation in the Provincial Court, on the 17th of February 1818, the Second Judge decreed as follows :

That the Collector having separated the aforesaid *turrufs* from the pergunna of Bazoochup in a manner contrary to regulation 25, 1793, such separation should be considered as of no effect ; that, although the plaintiffs sued for the recovery of damages, yet it was not proved that any had been incurred, nor could it be so until the period allowed for the Mofussil investigation had expired ; and that as the Collector had exceeded the bounds of his authority, he should pay the costs of suit.

The Collector, one of the defendants, being dissatisfied with this decree, appealed to the Sudder Dewanny Adawlut, laying his claim at 6,753 rupees, that being the amount of the three years' *jumma* of Hautcolly and Sunjirpore. The case came before the Second Judge (C. Smith) on the 14th and 19th of July 1824, the respondents not being in attendance, notwithstanding that due notice had been served on them. The papers filed in the Court of Appeal of Moorsshedabad, from No. 1, to the decree of the same Court, and three original English letters filed by the Company's *vakeel*, namely a letter from the Acting Collector of Zillah Rajshahy to the Board of Revenue, dated the 31st of March 1807, that of the Collector of the aforesaid zillah to the Secretary to the Board of Revenue, dated the 10th of September 1808, together with the letter of the Acting Collector of the same zillah to the Secretary to the Board of Revenue, dated the 25th of February 1809, were then inspected and judgment was given to the following effect :

It appears that Rughoonath Nundee up to the present time, has held his pergunna at a *jumma* exactly equal to that at which he purchased it in 1207. B. S., from Rammohun Chowdry and Nitanund Sein, and in which *jumma* that of the two places of Hautcolly and Sunjirpore was not included : it is therefore evident that the separation of the above mentioned places from the pergunna of Bazoochup took place before he (the said Rughoonath) purchased it. The claim of Shoojau Oodeen and his heir Moohummud Moortuza, is the same as that of Rughoonath, of whom they purchased their share in the zemindaree. It is clear that Rughoonath testified his consent to the separation of Tanti Bund (a place not connected with this suit) although it is not quite certain that he did so with regard to that of Hautcolly and Sunjirpore, the present disputed property. As, however, owing to the report made by the Collector of Zillah Rajshahy, the separation of the above

places from the pergunna of Bazoochup has been sanctioned by the Board of Revenue and confirmed by the Governor General in Council, it appears to the Second Judge, according to the 10th section of regulation 1, 1793, and 8th section of regulation 1, 1801, of little consequence whether the said Rughoonath did or did not give his consent, as the order of the Governor General in Council is decisive and final, and although what the Second Judge of the Provincial Court has recorded as his opinion concerning the 25th regulation of 1793, may be correct, yet that regulation is not applicable to this case, because it is not a case of division such as is contemplated in that enactment; moreover, granting it to be applicable, yet it does not authorize, without an order of Government, a division of property, with a view of changing the *jumma* formerly assessed on different parts of it; lastly, it does not any where empower the Judges of the Civil Courts to increase or abate the *jumma* fixed by the Collector and approved by the Board of Revenue. Such being the case, the Second Judge was of opinion that the decree of the Second Judge of the Provincial Court of Moorshedabad of the 7th of February 1818, should be reversed, and that the claim of Rughoonath and Shoojau Oodeen Moohumud should be dismissed.

On the 16th of August, the Fifth Judge (W. B. Martin) having recorded his concurrence in the opinion expressed by the Second Judge, a final decree was passed accordingly, the costs being made payable by the respondents.

1824.
Collector of Zillah Rajshaby, v. Rughoonath Nundee and Gholam Mortuza.

UBDOO RUHMAN, (son of MOORAD KHAN), Appellant,

1824.

versus

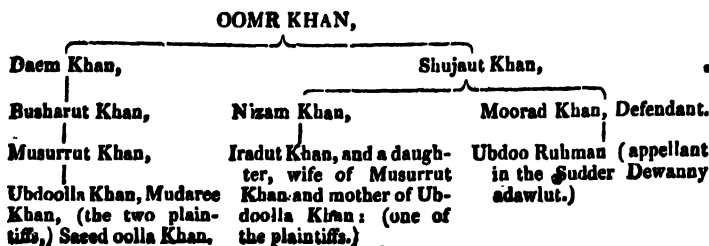
MUDAREE KHAN and others, Paupers, Respondents.

Aug. 17th.

THIS was an action brought by Mudaree Khan and Ubdoola Khan (since deceased) as paupers, in the Provincial Court of Bareilly, on the 29th of May 1820, against Moorad Khan, father of the present Appellant, to obtain possession of the half of twenty-three mouzas in the talook of Butawullee, situate in the pergunna of Utrawullee in the zillah of Allygurh, the annual rent of which was stated at 7,652 rupees, 8 anas.

The original ancestor of the parties having been deprived by the then existing Government of estates, which were recovered under another Government by the descendants of one of his sons, the descendants of another son will

The following is a sketch of the family in this case :



1824.

have no right to participate, and, according to the Moohum-mudan law, there is no right of representation; in other words, a man shall not inherit with his paternal uncle if his father died before his father's father.

The plaintiffs stated that they and the defendant were members of the same family, the common ancestor of which was a person by name Oomr Khan, to whom the whole of the property, half of which was now claimed, belonged; that Oomr Khan had two sons, Daem Khan and Shujaut Khan, from whom the parties in the present cause were respectively descended; that on the death of these two sons, Busharut Khan and Moorad Khan (the defendant) held the whole estate in common occupancy: that after their grandfather Busharut Khan and their father Musurrut Khan died, half of the estate devolved on them, the plaintiffs, and their brother Saeed Oolla Khan; that that brother having no children, had conveyed his portion by a deed of gift to Ubdoolla Khan, one of the plaintiffs; that until the year 1226, F. S., they and the defendant lived on friendly terms, dividing the profits of the property between them, the defendant receiving the half accruing to him from his father Shujaut Khan, and they the remaining half; that from the beginning of 1227 F. S. the defendant had illegally seized the crop belonging to Ubdoolla Khan, and that of Mudaree Khan from the beginning of 1228 F. S.; to obtain redress for which grievance was the object of the plaint now advanced.

The defendant replied, that the statement of the plaintiffs as to the whole twenty-three mouzas being the property of Oomr Khan was entirely false, for only one mouza situate in the pergunna of Butawullee really belonged to him, and even that he had been deprived of in the latter part of his life-time by the Jauts, in whose hands the country was at that time, and who had held continued possession of it for more than forty years, admitting neither Oomr Khan himself nor any of his children to any interest in the property claimed; that after the lapse of forty years, he (the defendant) obtained the proprietorship of one mouza on the payment of a large amount of arrears, and subsequently added to it the remaining twenty-two mouzas, the half of which was now claimed, at his own undivided cost and by his own unassisted exertions; that of the sons of Oomr Khan, Daem Khan, ancestor of the plaintiffs, died during his father's life-time, and consequently his children (as the law admits of no right by representation) were without a claim on any portion of the family estate; that this being so the deed of gift alleged to have been given to Ubdoolla Khan, one of the plaintiffs, by his brother Saeed Oolla, was obviously of no force whatever; that in fact, after the death of the aforesaid Daem Khan, neither his son Busharut Khan, grandfather of the plaintiffs, Musurrut Khan their father, nor themselves, had any, the most remote, right of participation in the land; that this was further supported by the long silence of the ancestors of the plaintiffs, as well as of the plaintiffs themselves, who had made no complaint of the exclusion of their names from the accounts of the revenue officers, either under the old Government or that of the Company, until the latter advanced their present suit; that the genealogical statement of the plaintiffs, professing that Nizam Khan (son of Shujaut Khan, father of the defendant), had a son Iradut Khan, and a daughter, mother of Ubdoolla Khan, one of the plaintiffs, was incorrect, but that this was immaterial to the decision of the case, for Nizam Khan died during

his father's life-time, and consequently, by the provisions of the Moohummudan law, his children could have no claim on their grandfather's property, since at his death they had a paternal uncle living. 1824.

The plaintiffs rejoined, that the whole property in question had belonged to Oomr Khan, and not one of the mouzas only, as the defendant asserted; that another assertion of the defendant, to wit, that Daem Khan had died while Oomr Khan was yet alive, was also false, for he had survived him by about ten or twelve years; that there were documents and evidence to establish the possession of both Daem Khan and Shujaut Khan on the estate, and it afforded no valid presumption against Busharut Khan and Musurrut Khan, son and grandson of Daem, who actually had possession, that holding lands at their respective periods of occupation, in common with others, the names of those others only, their partners, were entered in the revenue accounts of Government. They concluded by repeating their former allegation, that one of them (Ubdoolah Khan) had held his portion of the profits of the zemindaree till the end of the autumn of 1226 F. S., and the other (Mudaree Khan) till the same season in the following year. The defendant added nothing of importance to his former reply.

Ubdoo
Ruhman, &
Mudaree
Khan and
others.

The decree of the First Judge of the Court, dated the 4th of September 1821, was to the following effect: That it appeared on investigation that Oomr Khan was the original proprietor of the whole twenty-three mouzas specified in the claim; that the plaintiffs were the legitimate descendants of the said Oomr Khan, and as such, rightful owners, by the Moohummudan law as applicable to the circumstances of the case, of half of his property; and that the grant produced by the defendant, to invalidate that right, purporting to have been executed by Madhoo Rai Peishwa, on the 11th of *Zilhijja* 1196, F. S., was altogether undeserving of credit. The claim of the plaintiffs was therefore adjudged in their favour.

The defendant, dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut. The respondents were allowed to plead as paupers. On the 3d of April 1823, in compliance with the prayer of the appellant, who was desirous of undertaking a pilgrimage to Mecca, the name of his son Ubdoo Ruhman was substituted in lieu of his own, and on the death of Ubdoolah Khan, one of the respondents, his wife, by name Umeerun, took his place on behalf of herself and her two sons by the deceased, then in their minority. The case came to a hearing on the 27th and 28th of July 1824, before the Second Judge (C. Smith); and several fresh documents were produced by both parties, the most important of which were, on the side of the appellant, another grant professing to have been executed by Madhoo Rai, and a statement drawn up by Ram Ruttun, *Canoongoe* of the pergunna of Utrawullee, and the *Mookhtar* of another *Canoongoe* of the same place, with remarks in English subjoined by the Collector of Allygurh, bearing date the 1st of May 1822. And, on the part of the respondents, a bundle of accounts relative to the talook of Buttawullee for the year 1194 F. S. The following was the substance of the Second

CASES IN THE SUDDER DEWANNY ADAWLUT.

1824.

Ubdoo
Ruhman, v.
Mudaree
Khan and
others.

Judge's decision in the case; that none of the documents adduced by the respondents could be regarded as authentic, for, first, it was not a probable supposition that documents relating to so distant a date as the life of Oomr Khan should have been preserved amid the distractions and revolutions of the country and times; and again, even had they been preserved, they must have been in the hands of the branch of the family from which the appellant was descended, as having had actual possession, and not in those of the ancestors of the respondents; that, farther it was clear, from all the evidence, that the disputed talook was not left by Oomr Khan to his heirs; but that whatever portion of it he might ever have possessed had been taken from him during his life-time by the then authorities, and given in grant to some of their own partizans, from whom Oomr Khan had never again recovered it; that, after his death, his sons Shujaut Khan and Daem Khan had remained in the same state of destitution and died in poverty; that when the appellant, Moorad Khan, by the same means as his ancestor Oomr Khan had lost it, namely, the will of the existing authorities, got back the talook, it was, as he alleged, by his own unassisted exertions; and no name but his own was to be found in the records of any of the various Governments which had successively held power; that therefore the talook must be looked on as a private and personal acquisition made by Moorad Khan, and any share he might have bestowed upon the members of his family could be viewed only as a free gift, which it was equally in his option to withhold as to grant: that it was in no way clear that all the mouzas detailed in the claim had ever been possessed by Oomr Khan, and the only one, with regard to which alone there was no doubt, since the appellant admitted the point, had been taken from him; moreover, that, on the supposition that the property was to be disposed of by the common rules of inheritance, it was important to observe that the appellant had declared that Daem Khan, son of Oomr Khan and ancestor of the respondents, had died during his father's life-time: and if so, his sons could advance no claim *jure representationis*; that of course, at a period so remote from the date of the event to which it referred, it was difficult to ascertain the truth or falsehood of such a declaration, but that the very existence of the difficulty, to remove which sufficient evidence could not be found by the respondents, rendered it impossible, if their claim deserved to be dismissed on no other ground, to give a decree in their favour; that besides this, however, there were circumstances in the case which warranted a strong presumption against the probability of Daem Khan's having survived his father; for it was established that Moorad Khan had succeeded to the management of his grandfather's estate, while, had Daem Khan actually survived him, being as he was his eldest son, it was not to be supposed that his son Busharut Khan would have acquiesced quietly in an arrangement which threw so much more of the real influence of the property into the hands of Moorad Khan, son of his father's younger brother; that the case then stood shortly thus: first, it appeared to the Court that the property had been taken away by the Jauts from

the ancestor of the family, and therefore no longer belonged to him in any way, and could not devolve, as an ordinary inheritance, to his heirs; and that this conclusion was not affected by the accident of the same property having been given in grant, subsequently, to a descendant of the same family. But, secondly, granting that the property was such as to devolve, as an ordinary inheritance, to the heirs of the common ancestor of the family, the respondents in the present appeal could possess no claim on that ground, because their immediate ancestor Daem Khan had not been proved to have died after the death of his father; while this was established beyond a doubt with regard to Shujaut Khan, the immediate ancestor of the appellant; and that, lastly, there seemed to be no clear ground for the suspicions which the Judge of the Provincial Court had expressed with regard to the grant adduced by the appellant: but the establishment of its authenticity was not requisite to the decision of the cause, for all the evidence concurred in shewing that Moorad Khan had obtained the grant of the property by his own individual exertions, and on his own individual account, not with reference to any hereditary right he might happen to possess in the whole or part of the property involved in the grant.

1824.

Uddoo
Ruhman,
v. Mudaroo
Khan and
others.

The decree of the Provincial Court was therefore reversed, and the appellant confirmed in his possession of the whole talook, the case having been taken up on the 12th and 17th of August 1824, by the Fifth Judge (W. B. Martin), whose opinion was in unison with the above judgment.

MUSSUMMAUT QADIRA, *alias* MUSSUMMAUT USMUT,

1824.

Appellant,
versus

Aug. 24th.

SHAH KUBEER OODEEN AHMUD, Respondent.

THE respondent in this case, originally plaintiff, brought his suit in the Provincial Court of Patna, for the recovery of twenty-eight rent-free and eighteen assessed villages in zillah Behar, pergunna Sahsaram, estimating their value at 96,383 rupees. These he claimed as *Sujjada Nisheen*, or superior of the *Khangah* (a) or religious endowment of Sheikh Kubeer Durweish, in virtue of the appointment of his immediate predecessor Shumsodeen, on whose death his right had been recognized and himself installed. The defendant, the widow of Shumsodeen, had subsequently asserted a right founded on a certain deed of *hibba-bil-uwuz* or gift for a consideration made by her late husband. The land being claimed as appropriated to the repairs of the *Khangah* and the support of travellers, came under the provisions of regulation 19, 1810, and the plaintiff accordingly first laid his claim before the local agents. After a full investigation they made a favourable report to the Board of Commissioners. The report was approved by them, and subsequently by the Supreme Government, and posses-

By the use of the word *inaam* in a royal grant it does not necessarily follow that the property specified is conveyed in absolute proprietary right, if, from the general tenor of the instrument, it may be inferred that a *wuqf* or religious endowment was intended: and

(a) Thus rendered by *Meninski*.—*Domus, propter Deum extracta in usum Spphorum aut religiosorum, Cœnobium.*

1824.

property
so endow-
ed cannot
be private-
ly alien-
ated or
resumed.

sion was ordered to be given to the plaintiff. This order the defendant found means to elude, and the plaintiff was at length forced to sue in *formd pauperis* in the Provincial Court for the recovery of his right. The plaintiff's claim rested on two royal *firmans* granted by the Emperors Ferokhseer and Shah Alum to his predecessors Shah Kubeer Durweish and Qeam Oodeen. The first given by Ferokhseer to Shah Kubeer Durweish is to this effect (b), "In this auspicious time the illustrious *firman* is promulgated. By it one lack of dams (c) out of pergunna Huvelee Sahsaram in Soobah Behar, amounting to 1,197 rupees, more or less, are granted as *altumgha*, according to the particulars hereafter stated, to defray the expences of the *Khanqah* of Sheikh Kubeer

(b) As the case turns on the Persian phraseology of these *firmans*, copies of them are inserted :

درینوقت میمنت اقران فرمان والا شان واجب الادعان
صادر شد که یک لک دام از برگنه حوبلی سهرام صوبه
بهار که یک هزار و یک صد و نود و هفت روپیه کسری
حاصل آن است در وجه خرج خانقاه شیخ کبیر درویش از
ربیع یونت ثیل بطریق انعام التمغا حسب الضمن مقرر باشد
باید که متصدیان مهمات و غیرهم دامهای مذکور را نسلاً بعد
نسل و بطناً بعد بطن بتصرف او باز گذارند و از جمیع وجوه و
عوارض معاف و مرفوع القلم شمارند و درینباب هرسال سند
مجدد نطلبند و از دهم شهر ربیع الآخر سال پنجم از جلوس
والا تحریر یافت

درینوقت فرمان والا شان صادر شد که مبلغ دولک و هشتاد
یک هزار دام از برگنه سهرام و غیره صوبه بهار که مبلغ
سه هزار روپیه حاصل آن است در وجه انعام التمغا حقایق پناه
شیخ قیام الدین بجهت خرج وارد صادر بمعفی توفیر و آنچه
از حسن تردد به جمع آن بیفزاید از سدس ربیع یونت ثیل
حسب الضمن مقرر باشد باید که متصدیان مهمات و غیرهم در
استقرار این حکم معلی کوشیده دامهای مذکوره نسلاً بعد نسل و
بطناً بعد بطن بتصرف آنها باز گذارند و از جمیع وجوه و عوارض
معاف شمارند و هرسال سند مجدد نطلبند بتاریخ بیست
و چهارم شهر ربیع الاول سنه ۳ جلوس والا قلمی شد

(c) There was some difficulty in ascertaining the exact meaning of the terms 'so many dams of land' which is used in both these and many other *firmans*. In the *Ayzen Akbery*, vol. 1, page 59, the *dam* is said to be a copper coin, 40 of which go to the rupee. The numbers, as compared with rupees, stand thus in the Ferokhseer grant 1,00,000 dams = 1,197 rupees, and in the Shah Alum grant 2,81,000 dams = 3,000 rupees. If we reduce the *dams* to rupees at 40 to the rupee, we get for the first 2,500 rupees, and for the second 7,025 rupees. We must therefore suppose that the nominal value of this coin differed materially at different periods until fixed by the standard of *Akber*. For further information relative to the *dam* see Mr. Shore's *minute on the rights and privileges of Jagirdars*, cited in the third volume of Mr. Harington's *Analysis*, p. 405, et seq. and Gladwin's *Ayzen Akbery*, vol. 1, page 59.

Durweish from the commencement of the spring of *Yoont (d) Eel*. 1824.
 Let all the imperial officers now and hereafter leave the above *dams* in his possession for generation after generation, and let them consider them free of all charges. Let this *sunnud* be considered conclusive: written on the 12th of *Rubbee ool Akhir*, *An. Reg. 5*." Mussum-maut Qadi-
 On the reverse of the *sunnud* is the following notice, "The *Mussum-maut Us-mut, v. Shah Ku-beer Ah-mud*.
 Bukshee ool Mumalik has affixed his seal in proof that Khuleel Oollah, son of Shah Kubeer Durweish, presented a petition for an *altumgha* grant of 100,000 *dams* in pergunna Sahsaram, to defray the expences of a *Khangah* of Sheikh Kubeer, and that it was acceded to. Let it therefore be acceded to." The second *firman* granted by Shah Aulum to Qeam Oodeen is in these terms: "By our illustrious *firman* the sum of 281,000 *dams* of pergunna Sahsaram, &c. in Soobah Behar, amounting to 3,000 rupees, and whatever increase may be made on its *jumma* is granted as *altumgha* free from all charges to Sheikh Qeam Oodeen for the support of travellers, from the 6th of the spring of *Yoont Eel*, according to particulars hereafter stated. Let the imperial officers constantly remembering this order, leave the above *dams* in his and his children's possession for generation after generation. Let them hold them free of all taxes and impositions. Let this be considered conclusive: written on the 24th of *Rubbee ool Uwul*, *An. Reg. 3*." On the reverse was written, "A copy of the illustrious order to this effect, That the Mootusuddees grant a *sunnud* for the specified *dams*. Sheikh Unwur Oollah, Khadim of Fukeer Qeam Oodeen, has presented a petition setting forth, that he hoped that 281,000 *dams* in pergunna Sahsaram, &c. might be granted to defray the expences of the poor and the *Khangah*. It was ordered under the royal signature that the Mootusuddees grant a *firman* and *purwanna* accordingly." The plaintiff also filed three deeds executed by Qeam Oodeen and Shumsodeen containing express acknowledgments that the lands which they alienated by those deeds were granted to defray the expences of the *Khangah*, and to support travellers. On these grounds he argued that the land was *wuqf*, and the alienation of it by Shumsodeen in favour of his wife illegal and void *ab initio* (e).

The defendant, on the other hand, urged, that the *firman*s could by no means be understood as creative of *wuqf*, but that they were legal instruments of gift conveying a full proprietary right to the grantees. In support of this plea she filed a *futwa* which

(d) Literally, in the Turkish language "the year of the horse" according to the duodenary cycle of the Ighurians, or Turkish æra, adopted in all Mogul *sunnuds*: on which subject see *Gladwin's Translation of the Ameen Akbery*, vol. 1, page 337.—In the copies of the *firman*s which were filed in Court, these words

were written نوبت نيل which evidently have no meaning as applicable to the case in point. In the translation of a *firman* from the Emperor Alumgeer to one Rushik Das, given in page 263 of the 3d vol. of *Mr. Harington's Analysis*, I find the æra thus rendered, "from the Khureef harvest of the year *Neelan Eel*," or the year of the snake, which is the sixth year of the cycle, the year of the horse being the seventh.

(e) I have omitted to insert a *futwa* filed by the plaintiff in this case, because it merely laid down the law regarding *wuqf* property, without touching upon the only doubtful point, namely, whether the land in dispute was *wuqf* or not.

1824. she had obtained from the *Mudrussa* at Calcutta. It was to this purport. "The land conveyed by the *firmans* is a perpetual and permanent grant, (انعام) because it is settled on generation after generation without any restriction as to time, as is written in the '*Moktusr ool Husamee*, 'a grant is permanent and perpetual, when unrestricted in duration.' It may also be sold, given away or inherited, as is laid down in the *Wakiat*, 'a perpetual grant becomes the absolute property of the grantee, it may be sold, given away or inherited, and thus too in the *Moktusr ool Husamee*, 'a perpetual and permanent grant becomes the absolute property of the grantee, it may be sold, bought, given away, or let out on lease' Thus also in the *Koonbra*, 'land of which the Sooltan has made a perpetual grant, a Mooslim has the absolute disposal of, he may divide or sell it.' Nor is the land *wugf*, because the grant has created an absolute proprietary right, inasmuch that the gift or sale of it is valid, whereas *wugf* is defined to be the reservation of any thing as the property of the endower or as the property of God, which does not create an absolute proprietary right for any one. This is a settled point in all legal works on *wugf*: their sale and gift are illegal and void, whereas, in a permanent grant they are valid, and therefore this permanent grant cannot be *wugf*."

Mussum-
maut Qadi-
ra, alias
Mussum-
maut Us-
maut, v.
Shah Ku-
beer Ah-
mud.

On the 28th of June 1822, the Fourth Judge of the Provincial Court (J. B. Elliott) gave his opinion, that it appeared from the applications of the grantees, recorded on the backs of the *firmans*, and from the subsequent admissions of Qeam Oodeen and Shums-oodeen in the deeds executed by them, that the *altumgha* land had been granted as *wugf*, and that the alienation of them was consequently invalid, and must be set aside by the ruling power. He therefore annulled the deeds executed by Shums-oodeen in favour of his wife, and made over all the *lakhiraj* villages to the plaintiff, to whose appointment as *Sujjadah Nisheen* no objection had been urged. As to the *khirajee* or assessed villages, the defendant had been unable to account for the manner in which they came into her husband's possession, and as it was evident they could only have been acquired by funds arising from the *wugf* land, they should follow the same law. The whole property sued for was accordingly decreed to the plaintiff with payment of full costs against the defendant.

On an appeal brought by the defendant against the decree of the Provincial Court, the case first came before the Second Judge (C. Smith). After going through the documents he referred the two *firmans*, together with the deeds of Qeam Oodeen and Shums-oodeen to the law officers, requiring them to pronounce whether the grant was *wugf*, and whether, consequently, the deed executed by Shums-oodeen in favour of his wife, could stand. The following *futwa* was accordingly given by the two Mooftees, Abbas Ali and Ghoolam Soobhan. "We understand from the purport of the first *firman* that the grantee is the *Khanqah*, which is metaphorically put for the inhabitants and occasional residents there from amongst the poor and indigent, in the number of whom may be included Shah Kubeer Durweish and his sons, and others who might occasionally alight there. This, according to the received

opinion is *wuqf*, which is defined to be 'the reservation of any thing as the property of God, and bestowed alms from the profits arising therefrom.' It is true, the apparent meaning of *inaam* is to bestow a grant, yet, although this implies the creation of a proprietary right, it appears from the evident drift of the *firman* that Shah Kubeer Durweish cannot be the grantee. The *firman* therefore cannot be held to create a proprietary right, and sale and inheritance of the land conveyed thereby are invalid and void *ab initio*. We infer from the purport of the second *firman*, that Sheikh Qeam Oodeen is the grantee, and that travellers are mentioned, because many such alight at a Sheikh's house and become a burthen on his hospitality. Whereas then Sheikh Qeam Oodeen is a determinate grantee, the intent of the grantor is the creation of a proprietary right in him by that permanent grant, and not of *wuqf*. The villages included in this grant are therefore his property; after his decease the property of his heirs; and alienations of them by sale or gift are valid and conclusive, supposing the other conditions essential to their validity to have been observed. As to the deeds executed by Qeam Oodeen and Shums-oodeen, some of them contain indeed admissions that the land is *wuqf*, and others that it is absolute property: but still their opinions cannot be held in law to affect the merits of the case. The alienations of land in favour of the appellant are therefore null, or valid, according as they relate to villages conveyed by the first or second *firman*.

1824.

Mussum-
mant Qadi-
an, alias
Mussum-
mant Us-
mut, v.
Shah Ku-
beer Ah-
nud.

On the receipt of this *futwa* the Second Judge directed both parties to file lists of the villages conveyed by each *firman*, and gave them liberty to state any objections they might have to urge against the *futwa* of the Mooftees. On the 10th of May 1824, the cause again came to a hearing, when Mr. Smith gave his opinion in opposition to that of the Judge of the Provincial Court; that both *firman*s were not creative of *wuqf*, but of full proprietary right, and that therefore the alienations in favour of the appellant were valid. This opinion he founded on these grounds:

1st.—In neither of the two *firman*s does the word *wuqf* or an equivalent expression occur. *Khurch-i Khanqah* is a customary phrase in grants to Durweishes.

2nd.—In both *firman*s the word *inaam* is used, and this creates a full proprietary right. In four *firman*s filed by the respondent, which are admitted to have conferred a title to *wuqf*, this word does not occur.

3rd.—In both *firman*s it is stated that the *dams* should descend to generation after generation, and this is never specified in a deed of *wuqf*, as it is not in the *firman*s filed by the respondent. This proves that the grantee cannot be the *Khanqah*, because it is not endured with life, but is mere brick and mortar.

4th.—The *Sujjadah Nisheenship* is only an office, not descending in the same family, but filled by the appointment of the ruling power. Hence it can only be the person specified, and his heirs on whom the property was settled in full proprietary right.

5th.—The purport of the two *firman*s must be the same, because they were both issued in accordance with similar petitions, as recorded on the reverse of each respectively. Hence the title created by the two cannot be different.

1824.

Mussum-
maut Qadi-
ra, *alias* .
Mussum-
maut Us-
mut, v.
Shah Ku-
beer Ah-
mud.

6th.—It appears that all the land has been alienated at different periods, some of it to Sheikh Ghoolam Moohummud, the father of the respondent, so that if we admit the alienations to have been invalid, we must suppose all the incumbents successively to have been, not pious recluses; but robbers and plunderers who had treacherously and unfaithfully expended for their own use property appropriated for other purposes.

7th.—The assertion that the *Khiraajee* villages were purchased from the produce of the rent free lands does not rest on any proof, but is only inferred from the apparent probability of the case. A decree therefore concerning the latter does not necessarily involve the award of the former.

As this decision went to reverse the decree of the Provincial Court, the concurrence of another Judge was necessary, and the case accordingly came before the Officiating Chief Judge (J. H. Harington) who observing that at the time the *futwa* had been required from the law officers by the Second Judge, the *Cazee ool Koozat*, Moulovee Hamid Oollah, was absent, and had consequently not given his opinion on the subject, he referred the documents to him with the requisition of a *futwa*. He also sent the objections taken by both parties against the former *futwa* of the Mooftees to Abbas Ali, the only one of the two then in attendance, and desired him to state whether there was any thing brought forward in those papers which induced him to alter the opinion he formerly gave. The Mooftee in reply stated that he saw no reason which could operate to make him deviate from the *futwa* he had given before. To the word *inaam* he observed, that for reasons before stated, he attached no force, and as further proof that the nature of the grant did not depend on the word adopted to convey it, he adduced a passage from the *Futawa-i Alumyeeree*, "If a person were to say, 'I appoint this my house for the supply of oil for the lamp in the Mosque,' and add nothing further, the lawyer Aboo Jafur has said that in this case the house would become *wuqf* on his giving the *Mootuwullee* possession of it, and *futwas* are given agreeably to this decision." Regarding the *futwa* with reference to the second *sunnud*, he thus argued, "a proprietary right is expressly said by the law authorities to be created by the use of the word bestowal *اعطى* (f) as in the *Shurh Viqayah* in the book of gifts. It (a gift) is legally conveyed by the use of the expression, 'I have given, conferred, or bestowed, and I have fed you with this food, and I have appointed this for you.' As for the words 'for the support of travellers' after mention made of the grantee, it cannot change the nature of the grant from that of a gift to one of *wuqf*, as in the expression instanced by the author of the *Hidayah* and *Shura Viqayah*, and other lawyers, 'my house is a gift to you to inhabit it.' Here the words 'to inhabit it' are not considered as altering the nature of the deed from a gift to a loan. If also we consider the two

(f) The force of this allusion to the word *اعطى* does not clearly appear. It does not occur in the *firman*. He may consider it the equivalent to

مرحمت which occurs in the *purwanna*.

expressions, 'I have appointed this my house to supply oil to the lamp of the Mosque,' and 'I have appointed this for you,' it is 1824.

clear that notwithstanding the word appointed ^{جعلت} is, the same in both, yet, on account of the different objects specified, the lawyers have considered the former as creative of *wuqf*, the latter as constituting a gift and conveying full proprietary right. Thus, by a parity of reasoning, the word *inam* occurring in both *firmans*, which is the word the grantor has selected to convey his intentions, and that by which the transfer is effected, must, on account of the variation of the object in favour of which the grant is made, be considered as creative of *wuqf* in the first, and as a gift conveying full proprietary right in the second *sunnud*."

Musunn-
maur Qa-
dira alias
Musunn-
maut Us-
mut, v
Shah Ku-
beer Ah-
mud.

The *Cazee ool Koozt* gave it as his opinion, that there were some expressions in both *firmans* which might be considered as conveying a gift with certain stipulations for the repairs of the *Khanqah* and support of the poor, and others which supported the construction of their being a grant of *wuqf*. In cases of such perplexity he declared that reference should be had to the custom of the country, and that the question should be decided by the sense attached by common usage to the expressions.

This latter opinion was adopted by Mr. Harington, and in accordance with it he considered the case of *Kulb Ali Hosein versus Syf Ali*, (*vide* vol. II page 110) as a precedent in point. On these grounds therefore he decided that the *lakhiraj* villages were *wuqf* lands, and consequently incapable of alienation. He accordingly awarded them to the respondent, with payment of full costs in both Courts against the appellant. As to the *khirajee* lands, he considered it by no means proved, that they were acquired by the profits arising from the *wuqf* lands, and he therefore directed that as the respondent had been put in possession of them on the decree of the Provincial Court, they should be restored to the appellant with payment of mesne profits during the period of dispossession. The Fifth Judge (W. B. Martin) fully concurring in this opinion, a final decree was passed accordingly (g).

(g) This decision appears perfectly just and consistent with the Moohummudan law. The intent of the grantors is most clearly shewn in their entire accession to the petitions of the applicants, as stated on the backs of the *firmans*, and it is only the ignorance, or perhaps the venality of the Mootsuddes employed to draw out the *firmans*, which has involved the subject in obscurity. It is a fundamental principle of Moohummudan law, that in every ambiguous expression of a person in conveying a right to another, reference should first be had to the custom of the country, and on failure of that to the intention of the grantor as stated by himself. As regards *wuqf*, this is especially recommended in the *Futawa Aulunggerree*: if a person says, "this my land is for the way," and said this in a city where such words are commonly used for creating a title of *wuqf*, the land becomes *wuqf*, but if it is not so used, he shall be asked if he meant to make a *wuqf* grant, and if he do so intend, it shall become such; but if he meant to give it in alms, or meant nothing, it shall be considered a vow, and either it or else a sum of money of equal value, be given away in alms. Thus too, if he say, "I have appointed it for the poor," if this be *wuqf* in the common acceptance of the city, it shall be so, or if not, he shall be called upon to explain. Then, if he intended *wuqf*, it shall be so, or if he intended alms or meant nothing, it shall be considered a vow and given away in alms.—This too is in perfect analogy with other provisions of the code. In divorce and

1824.

ROSHUN KHATOON, Appellant,

versus

Nov. 10th.

JAN KHATOON, Respondent.

Where judgment is given against two persons jointly, one of them is not competent to appeal severally for the reversal of half the decree, nor can half a judgment be appealed from when given against one individual.

ON the 10th of November 1824, the petition for a regular appeal in this case against half of the decision of the Dacca Provincial Court, which had been filed on the 9th of the month preceding, came to a hearing before the Second Judge (C. Smith), being read with the other exhibits.

The proceedings of the Court in the cases (No. 1567) dated June 14th, 1817, and (No. 1404) dated May the 5th, 1819, having been read, the Second Judge recorded his opinion in the following terms :

Although the appeal of Roshun Khatoon, the appellant, against half of the decision of the Provincial Court of Appeal was allowed by this Court on the former cause (No. 1567) yet the proceeding on that occasion assigned no special reason for such admission. It would seem that the Court only took cognizance of the appellant's reply to the objection of dilatoriness in appealing, and considering her excuse a good one, admitted the appeal. It appears from the present petition, that the appellant is unable to adduce any other precedent for the course of proceeding which she now wishes the Court to sanction; and according to universal practice, whenever a sum of money has been decreed against two persons jointly, without specifying that each shall pay a moiety, it is not allowable for one of them to appeal against half of the decision. Independently, however, of general usage, the suit from which this is an appeal, relates to two years mesne profits of an estate, and there is one obvious objection to admitting an appeal of the nature now desired, which is this, the cause No. 1404 relates to the very same estate, and the decree passed by the Dacca Provincial Court on that occasion, which was affirmed by this Court, declares that as Roshun Khatoon had declared herself to be the rightful proprietor and possessor of all the property left by Ullah Yar Khan in right of dower, all the costs of that Court should be made payable by her. It is evident also, therefore, that while the present suit, instituted by the plaintiff, Jan Khatoon, was pending, that is, from the 30th of September 1812 to the 1st of October 1814, the petitioner was in sole and undisturbed possession of the whole property, and, consequently, that the present decree of the Provincial Court was in fact passed against her alone. The petition for an appeal against half of the decision was accordingly

manumission, where the law is particularly tender of the rights of both parties, the meaning of the expression constantly turns on the sense attached to it by the persons who uttered it. *Vide Arabic Hidaya*, pages 234, *et seq.* and 319

et seq. Thus too in gifts where the expression *حملتك على هذه الداية* may mean either a gift or loan, reference is had to the intention of the speaker. *Vide Hidaya*.—If then this rule is applied where the words of the speaker are ambiguous, it should surely hold good where his own wish is clearly expressed, and his intentions rendered ambiguous by the awkwardness of others. I apprehend that, legally, the two petitions and the royal acquiescence in them were quite sufficient to create the title; nor can *wuqf* once granted be ever recalled.

dismissed, and an order passed, that if the petitioner preferred an appeal in the usual form, within two months, against the whole award, it might be admitted.

THE COLLECTOR OF BUNDELKUND, Appellant,

1824.

versus

CHURUN DAS BYRAGEE, Respondent.

Dec. 1st.

THIS was an action brought by the respondent, *in formd pan-* Lands
peris, against Government, in the Benares Provincial Court, on granted as
the 25th of May 1819, to recover the free tenure of mouza Kutha, a rent free
in pergunna Bursutha, villah Bundelkund; eighteen times the tenure in
annual proceeds thereof being estimated at 18,018 rupees. *pudargha*,
not resum-

The plaintiff stated that the lands had been many years ago bestowed on his Gooroo, the Mohunt Ghureeb Das, in free grant, *pudargha* (literally water for laving the feet), under the respective *sunnuds* of Raja Hindoo Put, the Nuwab Ullee Behadoor, and his Naick Jeswunt Rao; that the Mohunt held possession of the same till his death in the *Fuslee* year 1209, but that the plaintiff, who was heir to the deceased, happening to be then absent on a distant pilgrimage, and the province falling into the hands of the Company, the Collector granted a settlement of the mouza to the zemindars at an assessment of 900 rupees; that he (Churn Das) petitioned against the measure on his return, and meeting with no attention, proceeded to Calcutta and made application to the Board of Revenue, by whom the Collector was directed to institute an inquiry, and that the Board at Furruckabad had issued similar orders; but that the officer in question had evaded carrying these instructions into effect, and that he had been eventually referred to the Courts for his remedy by the last mentioned Board. of Govern-
ment, who
accounted
to the
grantee for
the pro-
ceeds, held
that the
right to the
tenure is
not thereby
affected.

It was answered on behalf of Government, that the estate, so far from ever having been alienated as *pudargha*, or by any other description of grant, had been invariably subject to assessment under former rulers, as could be proved by a register of collections for ten years previous to the cession; that the plaintiff therefore could derive no cause of action from the circumstance of the lands still continuing so liable; that the claim to a free tenure would turn out on investigation to be utterly unfounded, as would indeed fully appear from the copy of a letter addressed on the subject by the Collector to his superiors, which was submitted for the Court's inspection.

On the 30th of April 1821, the First Judge of the Benares Court passed a decree in favour of the claim, with costs, noticing that the free tenure of the land by the plaintiff's predecessor had been established by the production of title deeds which were admitted to be unexceptionable, as well as by the concurrent testimony of the witnesses on either side; that although it had appeared in evidence that the revenues of the property had been collected under the rule of the Poondah Chief, Dhowkul Singh, by a person called Luchmun Singh, and during the government of Ullee

1824. Behadoor by his naick or manager, the same witnesses had also stated, that an account of such collections was rendered to the *Mohunt* by the ruling power, to whose care the mouza had been made over in consequence of the occupants failing to discharge their rents; and that, under these circumstances, as the pundit of the Court had in his *vyuvustha* declared, that the right conferred by the grant of *pudargha* was perpetual, the Collector's denial that the lands had ever been held free of assessment was of no avail in the absence of any proof of the grant having been resumed by the former powers.

The Col-
lector of
Bundel-
kand, v.
Churn
Das Byra-
gee.

On appeal to the Court of Sudder Dewanny Adawlut, the cause came on before the Second Judge (C. Smith) for trial, *ex parte*, as directed by him in a proceeding held on the 13th of November last. An application for further postponement preferred by Ghoolam Yuzdane, a pleader of Court, and seconded by one Kinkur Das, calling himself a follower of Ram Ruttun Das, alleged successor to the respondent, who had died since the appeal was admitted, having been disallowed, because the deceased had never made the deposit requisite to the due appointment of a pleader, and Ram Kinkur held no written authority to act on behalf of his principal, stated by him to be absent from illness, the Second Judge declared his judgment to coincide with that of the Provincial Court on the proved facts of the case, and expressed himself of opinion that the provisions contained in the second section of regulation 31, 1803, could not here apply; although Ghureeb Das did not continue to hold possession in his own person, as the conduct of the former Government towards him, far from amounting to resumption, was evidently an act of indulgence. A final order was therefore passed to dismiss the appeal, confirming the right of the respondent's heirs to hold the lands by perpetual free tenure, directing all costs of suit to be paid by Government, and an account to be rendered of all intermediate receipts between the date of the decree passed by the Benares Provincial Court, and the month of April 1824, when Churun Das was put in possession of the estate in execution of that order.

ULRUCK SINGH, Appellant,

18'4.

versus

BRIJPAL DAS and others, (Heirs of GOKUL DAS, deceased),
Respondents. .

Dec. 1st.

THIS was a suit instituted in the Benares City Court on the 23rd of July 1810, by Gokul Das, since dead, against the appellant, to recover 2,098 rupees, the principal of a bond, besides interest.

The plaint set forth, that Baboo Roop Singh, the defendant's father, took a farm of pergunna Chourasee, the amount of the assessment on which was paid to Government regularly on his account by the plaintiff's house; that in *Magh* 1200 F. S., on examining the books and vouchers, there appeared a balance of 5,500 rupees in favour of the house, due from the above individual, who at that time executed a bond for the amount, engaging within four years to discharge the debt by such instalments as were stated in the bond, or if he failed to do so, to pay an additional interest of one *per cent per mensem*; that on making up the accounts at the end of *Aghun* 1856, *Sumbut*, after deducting monies received, there remained a debit to the house of 3,298 rupees, of which Roop Singh at different times before his death paid 1,200 rupees; and that as the defendant, his son, who had succeeded to his property, refused to liquidate the balance, the plaintiff now sued for the sum of 2,098 rupees, exclusive of interest.

The account books of a banking-house will be held to furnish good evidence of a debt, if the authenticity of the accounts is sworn to by the writer of them, or if their authenticity may be presumed by correspondent entries in the books of any other respectable house.

The defendant, in reply, denied all knowledge of the bond, which he stated to be dated twenty years back, and that he himself was only twenty years of age at the present time; that besides, all the servants who had been in the employ of his father, Roop Singh, were dead; that since his father's death, which happened twelve years ago, no person had come from the plaintiff's house to demand the sum now claimed; and that if any balance had really been due to the house under a bond, they would not have failed to send a *gomashka*, or some other person connected with the concern, to apply for the discharge of the debt.

On the 27th of November 1813, the Officiating Assistant Judge dismissed the claim with costs, on the ground that there was some appearance of collusion having been practised between the plaintiff and the agent of the defendant's father.

On appeal to the Benares Provincial Court, the Senior and Officiating Judges were of opinion that the plaintiff had substantiated his claim, which had been improperly dismissed in the City Court. It was urged, as the chief objections to the appellant's claim, that the agent of Roop Singh, by name Soobuns Lal, was in point of fact a partner in the profits of the claimant's house; that he and another individual were the only two witnesses who had signed the alleged bond, and that the fact of Roop Singh's seal being affixed thereto proved nothing, as that individual subscribed his signature, in addition to fixing his seal, on all documents connected with his pecuniary transactions.

On this point the Court of Appeal took the evidence of the partners of the only two banking-houses with whom it could be

1824. ascertained that Roop Sing had dealings, but they stated their inability to furnish any satisfactory information by reason of the time which had elapsed since such transactions between them had ceased. To the allegation that Soobuns was the partner of the claimant no clear proof could be adduced. The authenticity of the bond therefore was considered as unimpeached, and accordingly, on the 23rd of November 1817, the Court ordered the appeal to be decreed, the decision of the Assistant Judge to be reversed, the appellant to sue separately for interest, but to receive the principal of his bond, namely 2,098 rupees, from the respondent, who was directed to pay the costs of both Courts.

Uluck
Singh, v.
Brijpal Das
and others.

Uluck Singh preferred a petition for a special appeal to this Court, which was allowed on the 29th of December 1818, by the Fourth Judge (W. E. Rees). The appellant maintained among other reasons, that no such paper as a *tumussook* or bond had been ever produced, and that although frequent mention of such a document had been made in proceedings of the Court below, yet, in point of fact, their decisions had been passed on the strength of a *kistbundee* or deed of instalment said to have been executed by the appellant's father. This objection appeared to be so far well founded, that, on reference to the Provincial Court, it appeared that no other instrument than the deed of instalment had been produced, which deed, however, it was contended, was, to all intents and purposes, a bond or *tumussook*. The reasons assigned by Mr. Rees for admitting the special appeal were in substance as follow : it appears that no other instrument was filed in the Courts below than the *kistbundee* or deed of instalment, dated *Mogh* 1849; this *kistbundee* or deed of instalment is in the decree of the City Court termed a bond or *tumussook*. The last instalment of that deed was due on the 15th of *Magh* 1853, corresponding to the 10th of February 1797. The claim was not brought forward until the 23rd of July 1810, or after a lapse of more than twelve years from the date on which the last instalment became due. There may therefore be a doubt as to the admissibility of the suit under the provisions of section 8, regulation 7, 1795. The case was next brought before the Officiating Judge (W. Dorin) on the 16th of January 1822, who expressed himself of opinion that it would be a highly dangerous precedent to admit a claim of debt against any individual solely on the ground of its appearing to be due on a banker's account book, without taking the deposition on oath of the writer of it as to its authenticity; but that, nevertheless, if the accounts of any other firm could be brought to corroborate those of the claimant, it would raise a strong presumption of their authenticity. It appearing from the allegations of the claimant, that the account books of Soobuns Lal and Muthoora Das (which were at the time deposited in Court in another suit) would verify those of the claimant's firm; the treasurer, and a Nagree Mohurri of the Court were desired to inspect those books, and report the result for the information of the Court. This was done accordingly, but the Officiating Judge, by whose order the investigation was made, having been compelled to quit the Presidency on account of ill health, their report was laid before the Chief and Officiating

Judges (W. Leycester and J. H. Harington.) It set forth that the account books of the claimant appeared to have been kept in a regular, methodical, and usual manner: that there was no reason to doubt their authenticity; that from the books of the claimant's house it appeared that the accounts of Roop Singh with their concern commenced in the *Sumbut* year 1845, and ended in the year 1857, during which interval there were many adjustments of accounts between the parties, and at the end of which there appeared against Roop Singh, the sum of 2,098 rupees; that the books which were in the office of Soobuns Lal and Muthoora Das (the former of whom was the agent of Roop Singh) extended as far back as the year 1854 only, but that in the accounts for the year 1856, there was one item of disbursement of 1,200 rupees mentioned, which corresponded with the credit for that sum given in the claimant's books.

1824.

Utruck
Singh, v.
Brijpal Das
and others.

On the 2nd of December 1823, the abovenamed Judges having perused this report, deemed it necessary to call for further evidence as to the authenticity of the claimant's account books; those of Muthoora Das and Soobuns Lal corroborating them in one item only, and the bond or deed of instalment not having been duly authenticated. A requisition to take further evidence on the point above noticed having been sent to the Court below, it appeared from their return that the only witness who could depose to the authenticity of the accounts was the individual who had written them, by name Jumna Das, then a resident in Calcutta. This individual having been consequently summoned and his deposition taken, which went to prove the authenticity of the ledgers adduced in support of the claim, there appeared no reason for altering the decision of the Court below, which was affirmed accordingly with costs.

1824.

RAMNARAIN MITTER, Appellant,

versus

Dec. 4th.

KALEE DAS RAI and others, Respondents.

A. made an usufructuary mortgage of certain lands to B., and some time after alleging that the sum borrowed by him had been realized with interest from the profits, retakes possession; B. sues A. for dispossession, and, while the case is pending, sells his title to C., who, by the summary decision of the Court obtains possession of the disputed lands with mesne profits; held that a suit may be preferred at one and the same time by A. against C and the heirs of B. (since dead) for redemption of the mortgage, mesne profits, and exemption from the summary award.

THIS was a suit instituted in the Calcutta Provincial Court, on the 5th of January 1813, by Kalee Das Rai and Parbutee Churn Rai against the appellant to redeem a mortgage and obtain possession of 223 beegas, 16 biswas of land in Bun Hooghly, pergunna Mughorah, the decennial produce being estimated at 2,028 rupees, also to recover 3,374 rupees, principal and interest of surplus proceeds, and to be exempted from the payment of 2,459 rupees, the amount of a summary award: total 7,861 rupees.

The plaint set forth, that the plaintiffs ancestors Ram Churn Rai and Raghub Indur Rai, mortgaged, on the 25th of *Magh* 1196, B. S., 194 beegas, 6 biswas of rent-free land, situated in the above mentioned pergunna, to Ram Mohun Bhose, residing in Sootanutte, one of the suburbs of Calcutta, for 500 rupees, consenting to let him remain in possession till he should have received his principal with interest from the proceeds of the land; that accordingly Ram Mohun Bhose obtained possession of the mortgaged property, as well as of nine beegas of *dewutter* land belonging to Lukhee Junardun Thakoor, and 20 beegas, 10 biswas of land standing in the fictitious name of Panchanun Mookurjeah, altogether 223 beegas, 16 biswas, and enjoyed and spent the rents of it; which, at the rate of 14 anas, 10 gundas per beega, amounted annually to 202 rupees, 13 anas, 2 pie, with interest from the year 1197 to 1203, B. S.; that the plaintiffs, finding in the year 1204, that the mortgage had been liquidated, and that there was a balance in their favour of 774 rupees, on reference to the accounts, again took possession of the lands, and collected part of the rents from the cultivators; that Ram Mohun Bhose sued the plaintiff Kalee Das, to recover the principal of the mortgage, and Kalee Das, Kalee Pershaud, and other zemindars of Ruttunpoor, through his Mokhtar, Durrupnarain Sircar, for unjust dispossession from the mortgaged property, and regained possession of the land at the end of the above year in consequence of a *purwanna* to that effect; that on the claim for the mortgage money being dismissed, the plaintiffs and their partner the late Gokulchund Rai obtained possession of the above estate in the month of *Poos* 1207, B. S., upon which Ram Mohun Bhose fraudulently brought another action by his Mokhtar, against Kalee Das, Kaleepershad Rai and the others, under regulation 49 of 1793, for dispossession of 3,225 beegas, 19 biswas, of assessed and rent-free land, laying his suit at 9,331 rupees, mesne profits; that Ram Mohun Bhose soon afterwards died, having sold all his right and title to the above lands to the present defendant, who succeeded him as plaintiff in the suit; that the Judge of the twenty-four pergunnas passed a decree in favour of the present defendant, awarding him 873 beegas, 8 biswas, of land in Ruttunpoor, &c. and 4,713 rupees, mesne profits, and the present defendant accordingly obtained possession at the end of the year 1216, on giving security, of the lands in dispute, which belonged to the plaintiffs as well as of the lands in Ruttunpoor

belonging to Kaleepershad and others; that on appeal to the Calcutta Provincial Court the decision of the Zillah Judge was affirmed, and mesne profits awarded to the defendant for the period of dispossession till the date of that decree; that on a further appeal to the Sudder Dewanny Adawlut the plaintiffs were ordered to sue for the redemption of their mortgage according to the regulations, within six months, and the judgment of the Provincial Court was upheld. These were the grounds of the present action. The reply of the defendant was to the following purport: The mortgaged lands in dispute were held and cultivated by Atmaram Bhose, previously to the mortgage under a *mokurreree putteet abadee* grant from the plaintiffs' ancestors, and were subsequently sold by his grandson Ram Soonder, and came into the possession of Radha Churn; and on his death, his widow, with his permission, gave them, as well as all the other real and personal property left by her husband, to her own brother Ram Mohun Bhose, and burnt herself with the body of her husband. In the year 1207, he (the defendant) succeeded to the above lands in right of purchase from Ram Mohun Bhose, and obtained possession in 1217 B. S., after the decision of the summary suit instituted by him, in conformity to the order contained in the decree of the Judge dated 11th of September 1809; although the *pottah* granted by the plaintiffs' ancestors, as well as other documents, were destroyed by the fire which occurred in Radha Churn Ghose's house, there are other documents extant to prove that the plaintiffs' ancestors were never in possession, and that the rents were enjoyed in regular succession by Ram Soonder Bhose, Radha Churn Ghose, and Ram Mohun Bhose, the real incumbents; although the deed of mortgage from the plaintiffs' ancestors to Ram Mohun Bhose declares that the rent-free lands should be held as security for the debt, it cannot affect his (the defendant's) right to keep possession of the waste lands which have been brought into cultivation. If the plaintiffs (who have only derived from their ancestors a right to rent) had any power to annul the *mokurreree* tenure of the above lands and to receive the surplus proceeds, why did they not sue Ram Mohun Bhose the actual *putteet abadee mokurrereedar*, who was in possession for fifteen years, from the commencement of the year 1196 B. S.? The present suit against the defendant, who had nothing to say to the debt to Ram Mohun, in which they had suppressed all mention of his (the defendant's) having cultivated the waste lands and enjoyed possession for a long period, merely noticing the mortgage, was altogether fraudulent and unjust. There was no truth, he asserted, in the statement with regard to the nine beegas of *dewutter* land belonging to Lukhee Junardun Thakoor, or the twenty beegas of land registered in the fictitious name of Panchanun Mookurjeah, because he (the defendant) had nothing whatever to do with the *dewutter* lands, the rents of which were collected by Durupnarain Bhattacharjea, and appropriated to religious purposes. He was ignorant who this Panchanun was, or where the lands in his name were situated. Parbuteechurn Rai, one of the plaintiffs, dying, was succeeded on his death by his son Kalee Koonwur Rai.

1824.

Ramnarsain
Mitter, v.
Kalee Das
Rai and
Others.

1824.

Ramnarain
Mitter, v.
Kalee Das
Rai and
others.

The plaintiffs, in reply, briefly added that their ancestor had never given a *mokurreree pottah* for the rent-free lands to Atmaram Bhoose, nor had the latter person ever cultivated any part of the rent-free lands through his tenants, or paid the rents for it in conformity to the then existing regulations. The defendant reiterated his former allegations.

On the 21st of July 1815, the Senior Judge of the Provincial Court nonsuited the plaintiffs with costs, on the ground that they had preferred two separate claims which had no connection with each other, in one and the same suit, namely, one for exemption from payment of the amount of the summary award, the other for the redemption of a mortgage and for the recovery of mesne profits, and that even if the plaintiffs obtained a decree annulling the mortgage on the lands in dispute, the heir of Ram Mohun Bhoose was the person liable to the payment of the mesne profits to the plaintiffs, for the time preceding the defendant's purchase, namely, 1207 B. S., and not the defendant. The plaintiffs were ordered to sue separately for each of the above claims.

On appeal to the Court of Sudder Dewanny Adawlut, the First and Second Judges (Messrs. Harington and Fombelle) on the 8th of February 1816, reversed the decision of the Provincial Court and directed the Judges of the Provincial Court to allow the appellants to institute, within one month, a fresh suit, without the payment of any further fees (including the heirs of the late mortgagee with the present respondent) for redemption of the mortgage, for mesne profits, and exemption from the payment of the amount decreed by the summary award. If the appellants brought a new action in the manner above recited within the prescribed time, the execution of the Provincial Court's summary decree, dated 15th of September 1809, was to be deferred till the matter should have been decided after an enquiry into the merits of the case, but if they neglected to do so, it was to be carried into effect. If the appellants succeeded in substantiating their claim on this occasion, mesne profits to the amount of the summary award were to be decreed in favour of them, and the execution of the former decree stayed.

The case accordingly came to a hearing a second time on the 1st of March 1816. Sheo Chund Bhoose and Mahesh Chund Bose, heirs of Ram Mohun Bhoose the late mortgagee, being included as defendants, presented a petition setting forth that they were minors, that their father had sold all his property, that they were in possession of none of it, and that the claim preferred by the plaintiffs was unfounded. On the death of Kalee Koonwur Rai, his brothers Ram Koomar Rai and Nub Koomar Rai succeeded him.

On the 15th of August 1821, the Senior and Officiating Judges of the Provincial Court passed a decree to the following effect:

Although the defendant Ramnarain Mitter has exhibited, for the purpose of proving the lands in dispute to have been an *istimreree* tenure, two papers of accounts dated 21st of *Kartick* 1196, B. S., and other documents, yet they are all inadmissible; for it is evident on an examination of the accounts that they are fabrications, and written on new paper which has been torn and disfigured to give it an old appearance. The other writings are not witnessed, and the de-

1824.
 fendant has not produced the *pottah* and other documents necessary to prove the *mokurreree* tenure, and from which the Court might have judged the nature of it. It appears from the depositions of the witnesses on both sides, that the plaintiffs were seized of the lands in dispute at the time of the mortgage; that Ram Mohun Bhose obtained possession under a deed of mortgage and *ikrar-nama*; that the annual rents amounted (calculating at the rate of 14 anas a beega) to 202 rupees, 13 anas, 2 pie, but it does not appear from the papers of the case, that Ram Mohun Bhose or the other defendant ever paid a fraction of the revenue to the plaintiffs or their ancestor. Besides, the mortgage deed does not fix any period for the payment of the debt, and under section 10, regulation 15, of 1793, the mortgagee having had the usufruct of the mortgaged property, the principal and interest of the mortgage money must be deducted from the mesne profits realized from the estate. They therefore passed a decree awarding to the plaintiff possession of 223 beegas, 16 biswas of land, and the sum of 2,340 rupees, 10 anas, 7 pie, principal and interest of the mesne profits, payable from the estate of Ram Mohun Bhose, for the period during which the property was enjoyed by him, and 466 rupees, payable from the defendant Ramnarain Mitter, for the years 1217 and 1218 B. S., and releasing the plaintiffs from liability to the payment of the summary award. Ramnarain Mitter was further ordered to pay mesne profits to the amount of 1,892 rupees, 15 anas, 12 pie, for a period of nine years, commencing from 1219 B. S. to the date of the Court's decree, as well as all the costs of the suit.

Ramnarain Mitter preferred an appeal to the Court of Sudder Dewanny Adawlut, laying his appeal at 5,021 rupees, the amount of the annual produce, mesne profits, and the summary award.

The case came before the Second Judge (Mr. C. Smith) on the 26th and 27th of July 1824, who referred it to the Acting Judge, in consequence of a former suit connected with it having been decided by him on the 21st of June 1824 (a).

Accordingly the cause came to a hearing on the 26th of August 1824, before the Acting Judge (Mr. J. Ahmuty) who having read the pleadings and all the papers connected with the case, recorded his judgment to the following effect :

The appellant has failed to produce the *pottah*, or any other authentic document to establish his *istimreree* tenure, and the only excuse he alleges for omitting to do so is that they were destroyed by fire. Independently of this, however, it appears that Ram Mohun Bhose only enjoyed possession of the lands in dispute under a deed of mortgage in his own name, dated the 25th of *Magh* 1196, B. S. As the above deed seems to have been executed subsequently to the date prescribed by section 10, regulation 15, of 1793 (viz. March 28th, 1780) which specially enacts "that all mortgages of real property are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it shall have been realized from the usufruct of the

(a) See the case of the same appellant *versus* Kaleepershad Rai and others, decided on the 21st of June 1824, page 372.

1824. mortgaged property subsequent to the above date, or otherwise liquidated by the mortgagee," and as the annual rent of 194 beegas of land, the extent of the mortgaged estate, amounts to 175 rupees, 13 anas, calculated at the rate of 14 anas 10 gundas per beega, as has been proved by the testimony of the witnesses adduced in the present case, the Court are of opinion that the principal and interest of the deed of mortgage, under which Ram Mohun Bhose obtained possession of the lands in question have been liquidated according to the provisions of the above mentioned regulation, and therefore there does not appear the slightest ground or reason for altering the decree of the Calcutta Provincial Court, dated August the 15th 1821, which was accordingly affirmed, and the appeal dismissed with costs.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

ACCEPTORS.

See BILL OF EXCHANGE, 1.

ACCOUNTS.

- 1 In a case of disputed accounts between two European shop-keepers, the Court referred the proceedings to a gentleman skilled in mercantile affairs, and passed a decree on the basis of his report. 117
See Note, page 68. BANKING CONCERN, 2.

ACQUISITIONS.

- 1 Lands acquired by four undivided Hindoo brothers will, after their death, be made into four shares, and one share given to the representatives of each brother, unless it can be proved that there was any inequality in the degree of labour or funds supplied by one or more of them in making the acquisition. 74

ADOPTION.

- 1 According to the Hindoo law a son adopted with the permission of her husband, by a woman on whom her father's estate had devolved, will not be entitled to such estate on his adopting mother's death, but such estate will go to her father's brother's son, in default of nearer heirs. 128
2 According to the Hindoo law, while a brother's son exists the adoption of any

other individual as a son, either in the *Duttaka* or *Kritrima* form of adoption, is illegal. 144

- 3 According to the Hindoo law, a boy adopted by a widow, with the permission of her late husband, has all the rights of a posthumous son, so that a sale made by her to his prejudice, of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity. 228

- 4 According to the Hindoo law, as current in Behar, an only son cannot be given or received in the *Duttaka* form of adoption. 232

- 5 According to the Hindoo law, as current in Behar, the grandson of a paternal uncle is excluded by a brother's son, and, on the brother's son's death, by his widow, if the family were divided; and according to the same law, a boy adopted by the *Kritrima* form takes the inheritance both in his own family and in that of his adopting parents. 307

- 6 In the case of a Hindoo of Bengal dying in his father's lifetime without issue, but leaving his widow authorized to adopt a son, if such adoption be made by the widow with the knowledge and consent of her husband's father, at any time before he shall have made any other disposition of the property, or a son shall have been born to his daughter in wedlock, no such subsequent disposition or birth shall

invalidate the claim of the son so adopted to the inhegiance. 367

- 7 In the case of an adoption by a widow without having obtained the consent of her husband, or in which the adopted son shall not be delivered over to her by either of his parents, but only by his brother, the Court will not hold the adoption valid, and if a son legally adopted, shall, being of age, execute an agreement, acknowledging the validity of his right to depend on his performance of certain conditions, his infraction of those conditions will be held to nullify his right. 387

See PRACTICE, 9.

ADVOCATE GENERAL, (OPINION OF;)

See pages 122 and 126. Note, page 112.

ALLUVIAL LANDS.

- 1 Claim to certain lands alleged to have been washed away by the stream from the plaintiff's estate; judgment given in favour of the defendants, to whose estate they had become gradually annexed, without any proof of their allegation that those lands were formerly their property, and had been recovered by the recession of the river. 316

See PRACTICE, 16.

ALTUMGHA LANDS.

- 1 Held that *Altumgha* lands are inheritable property, and ordered that they should be divided among the heirs of the original proprietor, their opponents claiming under a deed of gift alleged to have been executed in their favour by a person on whom the Patna Provincial Council had made a grant of the *Altumgha* lands *de novo*, and in whose favour a decree to hold them had been passed by the same authority; it appearing that the Persian decree (which the Sudder Dewanny Adawlut considered themselves bound to follow) awarded to the donor possession as manager only for the ancestor, and as no grant for lands whose produce exceeded 1,000 rupees *per annum*, could be valid without the sanction of the Supreme Council, which had not been obtained in this instance. 179

APPEAL.

See PRACTICE, 19.

ARBITRATORS.

See AWARD, 1. Note, page 5.

ARMENIAN LAW.

See VERBAL BEQUESTS, 1.

ASSESSMENT.

- 1 The assessment imposed at the time of the decennial settlement on a talook held under a *Jungulbooree* tenure, is liable to be enhanced according to the pergunna rates, on a measurement of the lands brought into cultivation. 34
- 2 An engagement having been taken from a landholder in Cuttack, to pay so much rent for his talook, in the event of all the lands therein comprised being declared by the result of the suit which he had instituted to be liable to assessment, held by the commissioner, that on decree to that effect, the revenue of such lands should not belong to Government, though exceeding ten *beegahs*. Decree affirmed by the Sudder Dewanny Adawlut. 253
- 3 Held that lands granted by the former *Soobadar* of Cuttack, to a *Khundait* or Sirdar of Pykes who had held them at one invariable quit rent for more than twelve years before the Company's government, are not liable to any increase of assessment, although the grant did not specify the term *mokurreree*, *ustimraree*, or other word signifying perpetuity. 346
- 4 On suit by the respondent to be exempted from the demand of increased assessment, claim disallowed on proof that the former Collector had erroneously granted a *Zameendaree pottah* deducting an allowance for *dchyeck* and *bhuray*, which was the right of the *tehseldars* alone, and had been resumed on settlement with the proprietors; but the decree providing that no further increase should be demanded, a petition for review was granted, and it was finally decreed that the respondent should not be exempted from the increased demand, but that if dissatisfied therewith, he might apply for a new settlement. 382
- See DEPENDANT Talooks, 1.

ASSETS.

See DOWER, 2.

AUCTION SALES.

See SALES, 1, 4, 5, 9, 10.

AUMEEN.

See PRACTICE, 16.

AWARD.

- 1 An order by a Zillah Judge for the execution of a private award by arbitrators is not appealable. 4
- See PRACTICE, 1. INTEREST, 3. Note, page 5.

AYMAH.

See Malikana, 1.

BANKING CONCERN.

- 1 The partners of a banking concern held jointly and severally responsible for an undertaking executed in their names by the managing partner. 1
- 2 The account books of a banking house will be held to furnish good evidence of a debt, if the authenticity of the accounts is sworn to by the writer of them, or if their authenticity may be presumed by correspondent entries in the books of any other respectable house. 417

BHURAY.

See ASSESSMENT, 4.

BILL OF EXCHANGE.

- 1 The seller of a bill of exchange which was not discharged by the drawer, held responsible for the amount in the first instance to the acceptor. 177
- 2 Held that the seller of a bill of exchange is answerable for the amount in the first instance, when not paid by the drawee; that his having lodged the amount of it in the hands of another banker on account of the purchaser, without the purchaser's sanction, does not exonerate him, and that his not having received back the bill or caused it to be cancelled, affords sufficient presumption, in the absence of proof to the contrary, that sanction was not obtained. 248

BILL OF SALE.

See SALES, 6.

BOARD OF REVENUE.

See LEASES, 1. RESUMPTION, 1. SETTLEMENT, 1. PRACTICE, 13.

BONDS.

See MORTGAGE, 1. INTEREST, 2, 4, 5, 8. DEBTS, 4. PRACTICE, 13.

BORROWER.

- 1 Money lent by a Judge to a native officer on his establishment held not to be legally recoverable, agreeably to the spirit of regulation 38, 1793, the borrower holding lands in other districts, though not in the district of which the lender was Judge. 14

BOUNDARIES.

See PRACTICE, 11.

BRAHMACHAREE.

See ENDOWMENTS, 1.

BROTHERS.

See SHARES, 1. ACQUISITIONS, 1. INHERITANCE, 5, 6, 7, 8, 9. GIFTS, 4.

BROTHER'S DAUGHTER'S SON.

See INHERITANCE, 2.

BROTHER'S SONS.

See INHERITANCE, 5. ADOPTION, 1, 2, 5.

BURRA THAKOOR.

See INHERITANCE, 3.

COLLECTORS.

See LEASES, 1. DEFALCATION, 1. SURETY, 3. SETTLEMENT, 1, 2. ASSESSMENT, 4.

COMPENSATION.

See INTEREST, 4. SALES, 10.

CONDITIONAL SALES.

- 1 In case of a sale of land with stipulation of its being cancelled in the event of the purchase money being repaid within nine years, accompanied at the same time by an understanding on the part of the sellers that a portion of the property so sold (which had been previously mortgaged) shall be redeemed within three months, or on failure thereof that the conditional sale shall immediately become absolute, held, that such contract should not be enforced, as being unjust towards the sellers, and contrary to the provisions of regulation 17, 1806. 78
- See MORTGAGES, 2. SALES, 6.

CONTRACTS.

See CONDITIONAL SALES, 1.

COPARCENERS.

See GIFTS, 1. SALES, 2. SURETY, 3.

COSTS.

- 1 Order for costs of suit to be paid by the successful party reversed. 44
- See DEBTS, 1. Note, page 260.

CREDITORS.

See DEBTS, 2. SURETY, 4. INTEREST, 4, 6, 8.

CUSTOMS.

See Note, page 41.

CUTTACK.

See ASSESSMENT, 3.

DAUGHTERS.

See VERBAL REQUESTS, 1. INHERITANCE, 1, 6, 9. HEIRS 1, 2, 3. SHARES, 1. GIFTS, 1. ADOPTION, 6.

DAUGHTER'S SONS.

See GIFTS, 1. ADOPTION, 6.

DEBTORS.

See SURETY, 4. INTEREST, 8. LEASES, 3.

DEBTS.

- 1 Part of a debt having been realised by the process of the Supreme Court, and action there having been discontinued, it is still competent to the complainant to sue for the remainder in a Provincial Court, though the claim to be reimbursed for costs of suit incurred in the former Court will be rejected. 66
 - 2 Held that the institution of a suit for the recovery of a debt before the time specified for payment, is not sufficient ground for depriving the creditor of interest after the debt has become due; though sufficient for the refusal of costs or for nonsuit. 68
 - 3 Money having been borrowed to discharge arrears of Government revenue, by a person erroneously registered as proprietor of an estate, the rightful proprietor, on coming into possession, will be held liable for the debt: and this is conformable to the Hindoo law. 93
 - 4 In a case where money was borrowed and a bond executed for the payment thereof at the legal rate of interest, (12 per cent) and afterwards another bond executed for the payment of one-half per cent, as *Mihnutana*, the Court held that no part of the original debt was recoverable, even though no illegal interest had been received. 205
- See INHERITANCE, 1, 2, 3, 4, 5, 6. PRACTICE, 13, 15.

DECENNIAL SETTLEMENT.

See ASSESSMENT, 1. DEPENDANT TALOOK, 1.

DECLARATION.

See PARENAGE, 1.

DEBTS.

See PRACTICE, 6. SALE, 6.

DEFALCATION.

- 1 The surety of a native officer, employed under a Collector, is not liable to make good a defalcation discovered after the death of such native officer. 65
- See SURETY, 3.

DEFAULTERS.

See SURETY, 3. SALES, 9, 10.

DEFENDANTS.

See DOWER, 1. PRACTICE, 2, 15. EVIDENCE, 1.

DEHYEK.

See ASSESSMENT, 4.

DEPENDANT TALOOK.

- 1 A dependant talook for which a *sunnud* had been granted by the former proprietor to hold it at a fixed rent, but which was granted within twelve years before the decennial settlement, held liable to increase of assessment by the present proprietor, though not an auction purchaser. 221
- 2 The plaintiffs sued to have two *turrufs* reannexed to their estate, on the plea that they were dependant, rejected on proof that they had been separated before the plaintiff's purchase of the estate, and distinctly assessed by the Collector, and assessment confirmed by Government. 400

DEPOSIT.

See SALES, 5.

DEWAN.

- 1 The Dewan of a subordinate commercial factory held responsible for the sum of 10,000 rupees, which he had entered in his books as received from the principal factory, although such sum was never sent. Judgment against a person alleged to be his surety reversed on investigation having been made by the Court below on his denial, and the fact not admitting of satisfactory proof. 160

DISTRIBUTION.

See SHARES, 1.

DIVISION.

See LIMITATION, 5. SALES, 8.

DONORS.

See *Attumgha* LANDS, 1. GIFTS, 3.

DOWER.

- 1 A claim having been preferred against the widow of a Moosulmaun by his sister, for half the property left by him, which was finally adjudged to be her right in lieu of dower, and twenty-one years after

that decision, the same plaintiff having brought an action against the same defendant for half of the same property, on the plea that even supposing the dower to have amounted to the sum claimed, she had realized the full amount from the profits of the estate, it was held that the claim is inadmissible. 12

- 2 On claim to certain land in satisfaction of dower, there being no other assets, the Court will award possession of them to the widow, if they do not exceed in value her proper dower, or such as is proportionate to the rank and circumstances of her family, although no deed of dower may be forthcoming. 321
See Note, page 295.

DRAWEE.

See BILL OF EXCHANGE, 1, 2.

DURESS.

- 1 The Sudder Dewanny Adawlut having decided that no duress was used by A. in a suit between A. and B. it is not competent to the Courts below to give judgment in favour of C. against A. on the ground of the proof of such plea. 41

DUTTACA.

See ADOPTION, 2.

ENDOWMENTS.

- 1 The nephew of a deceased *Brachmacharee* appointed to succeed him in the *Guddee* of a religious endowment, on proof of his title being superior to that of the person in possession, for various reasons assigned in the decree. 358
2 By the use of the word *Inaam* in a royal grant it does not necessarily follow that the property specified is conveyed in absolute proprietary right, if, from the general tenor of the instrument, it may be inferred that a *wugf* or religious endowment was intended: and property so endowed cannot be privately alienated or resumed. 407

ENGAGEMENTS.

See ASSESSMENT, 2. LIMITATION, 5. INTEREST, 8.

EVASION.

See INTEREST, 4.

EVIDENCE.

- 1 According to the rules of Moohummudan law, it is necessary that the plaintiff should adduce evidence to prove his claim on simple denial by the defendant; but when any special plea is urged, the *onus probandi* rests with the defendant. 102
See PRACTICE, 15. *Hikarnama*, 1. BANK-

ING CONCERN, 2. Note, pages 24, 106, 156.

EUROPEANS.

See ACCOUNTS, 1.

EXCLUSION.

See VERRAL BEQUESTS, 1. INHERITANCE, 1, 5, 6.

FARM.

See INTEREST, 8.

FARMER.

See SETTLEMENT, 1.

FATHERS.

See WIDOWS 1. HEIRS, 1. ADOPTION, 1, 6. INHERITANCE, 9. SALES, 11.

FORECLOSURE.

See MORTGAGES, 2, 3, 5.

GIFTS.

- 1 According to the Hindoo law, as current in Bengal, a coparcener may dispose of by gift or otherwise his own undivided share of the ancestral landed property, notwithstanding he may have a daughter and a daughter's son living. 138
2 Held that the Moohummudan legal objection of indefiniteness does not apply to a gift under which possession has been held upwards of twelve years. 176
3 Case of a claim by the legal heirs adjudged, though opposed by an alleged deed of gift, it being doubted whether that deed was executed at all, or whether at the time of its execution the donor, from extreme old age, was in his sound mind. 377
4 A Hindoo of Bengal may lawfully convey all his property by a deed of gift to his brother, notwithstanding that he has a wife living. 397
See Note, pages 45, 177.

GRAND DAUGHTERS.

See HEIRS, 1.

GRANDSONS.

See INHERITANCE, 1. HEIRS, 1. LIMITATION, 2. ADOPTION, 5.

GRANTS.

See LEASES, 1, 2. *Altumgha* LANDS, 1. ASSESSMENT, 3.

GRANTFEE.

See LEASES, 1, 2.

GRANTORS.

See LEASES, 2.

GUARDIANS.

- 1 In a suit instituted against a minor landholder and his guardian jointly, to recover rents unduly levied during the minority of the former, held that the latter is alone liable, in the first instance, notwithstanding that the former had attained to majority before the final decision of the suit. 83

GUARDIANSHIP.

See SALES, 3.

GUDDEE.

See ENDOWMENTS, 1.

HEIRS.

- 1 The heirs of a Hindoo being a son's son, two daughters of another son, and the widow of a third son, adjudged that the grandson take one-third, the two granddaughters one-third between them, and the widow one-third.—The widow of a son who died before his father entitled to food and raiment only. 33
- 2 The heirs of a Moosulmaun, being his widow and three daughters, the estate should be made into 24 parts, of which the widow takes an eighth or 3, and the three daughters 7 each. 58
- 3 The heirs of a Moosulmaun, being his widow, two sons, and four daughters, the estate should be made into 64 parts, of which the widow is entitled to 8, the sons to 14 each, and the daughters to 7 each, and being his mother, his widow, and three sisters, should be made into 39, of which his widow is entitled to 9, his mother to 6, and his three sisters to 8 each. 59

See VMBAL BEQUESTS, 1. INHERITANCE, 2, 4, 7, 8. LEASES, 1, 2. ADOPTION, 1. STIPEND, 1. *Atumgha* LANDS, 1. MARRIAGE, 1. MAINTENANCE, 1. LIMITATION, 6.

HINDOO LAW.

- 1 According to the Hindoo law, as current in Behar, neither joint property nor the profits arising from sacrificial fees are fit subjects of transfer. 232
- See SALES, 2. INHERITANCE, 1, 5, 9. WIDOWS, 1. DEBTS, 3. ILLEGITIMATE SONS, 2. GIFTS, 1. ADOPTION, 1, 2, 3, 4.

HINDOOS.

See HEIRS, 1. WIDOWS, 3, 4. SURETY, 3. LIMITATION, 2. GIFTS, 4. ACQUISITIONS, 1.

HUSBANDS.

See INHERITANCE, 4, 5, 7, 9. WIDOWS, 2, 4. ADOPTION, 1, 3, 6. MAINTENANCE, 1. LIMITATION, 6.

IKRARNAMA.

- 1 An *Ikrarnama* or written acknowledgment from the defendant to the plaintiff, that the latter is proprietor of a portion of the estate belonging to the former, held to be good evidence of the transfer, although no consideration was proved, an attempt by the defendant to prove a counter *ikrarnama* by the plaintiff having failed. 392

ILLEGITIMATE SONS.

- 1 According to the Hindoo law, an illegitimate son of a Rajpoot, or any of the three superior tribes, by a woman of the Sudra or other inferior class, is entitled to maintenance only. 132

INAAM

See ENDOWMENTS, 2.

INDEFINITENESS.

See GIFTS, 2.

INHERITANCE.

- 1 According to the Hindoo law, property inherited by a daughter goes at her death to her son or grandson, to the exclusion of her sister and sister's son. 26
- 2 The brother's daughter's son, and the grandson of a daughter's son, cannot inherit according to the Hindoo law, even though there be no other heirs. 37
- 3 According to a custom prevalent in certain mountainous estates of Tipperah, the ordinary rules of inheritance do not prevail, and the individual of the family designated *Jobraj*, and calling him the individual called *Burra Thakoor*, succeeds to the estate and title of *Raja*. 40
- 4 Of two widows on whom their husband had settled his property in equal proportions, one dying, the other has no right of inheritance agreeably to the Moohummudan law; but the deceased widow's sister's son will take the property in default of nearer heirs. 90
- 5 Property which had devolved on a widow at the death of her husband, goes at her death to her husband's younger brother, to the exclusion of his elder brother's son, agreeably to the Hindoo law of inheritance. 106
- 6 In a suit in which both parties are *Shaeas*, the Court will decide agreeably to the doctrines of that sect; and, according to the law of inheritance prevailing among them, a brother is entirely excluded by a daughter. 164

- 7 According to the Hindoo law, as current in Bengal, on the death of a widow, the property which had devolved on her at her husband's death will go to her husband's brother, to the exclusion of his nephews. The widow of another brother is not a legal heir to such property under any circumstances. 289
 - 8 The heirs of a Moonsilmaun being his mother, his brother, and his widow, his property should be made into twelve parts, of which four will go to the mother, five to the brother, and three to the widow, and on the mother's death her shares go exclusively to her surviving son. 295
 - 9 According to the Hindoo law, as current in Bengal, on the death of a widow who had claimed her husband's property, her daughter will inherit to the exclusion of her husband's brother, if the daughter have or is likely to have male issue, and on her death without male issue, her father's brother will inherit to the exclusion of her husband. 361
 - 10 The original ancestor of the parties having been deprived by the then existing Government, of estates which were recovered under another Government by the descendants of one of his sons, the descendants of another son will have no right to participate. 403
- See WIDOWS, 1. PRACTICE, 14. ADOPTION, 6.

INTEREST.

- 1 The Courts are not competent to strike off interest on the ground of delay in suing for a debt, if the claim be otherwise cognizable 48
- 2 A bond having been executed before the 1st of January 1804, bearing interest at the rate of 12 per cent per annum, and subsequently to that period a second bond (the first remaining uncanceled) for the same debt at a higher rate, held that agreeably to regulation 34, 1803, the legal interest is not thereby forfeited. 96
- 3 A. having sued B. for debt in a Court of Appeal, obtains judgment with an award of interest from the date of the decision; on appeal by B. judgment affirmed on the merits of the case. A. afterwards sues B. in the City Court for interest from the institution of the original suit. Held that the claim is cognizable to supply the defect in the former decree. 127
- 4 Held that it is not an evasion of the usury regulations for a surety to exact more than the legal interest, on advance of Government revenue made by him, as compensation for his risk; and a claim being preferred for the amount of a debt on bond, exclusive of interest, the Court adjudged, in decreeing the claim, that it was optional with the creditor to take interest at the rate of 12 per cent per

- annum, from the date of plaint to the day of payment, or to institute a fresh suit for interest equal to the principal from the date of the loan. 261
- 5 Judgment by a Zillah Court for principal and interest of a 'bond' debt, together with interest on the aggregate sum from the date of suit, confirmed on appeal to the Provincial Court, with interest on the amount of the judgment; but interest while the cause was pending on special appeal before the Sudder Dewanny Adawlut calculated on the amount of the original bond only. 268
 - 6 Held that, according to the spirit of section 6, regulation 15, 1793, the Courts may award interest exceeding the principal of a debt, if the excess accrued *pendente lite* and without any fault of the creditor. 270
 - 7 In a claim to mesne profits of land, the Zillah Judge having awarded the profits claimed *without* interest, it is not competent to a single Judge of a Provincial Court on appeal to award interest on the profits. 343
 - 8 In the case of a bond bearing interest at 6 per cent, the Court will award payment of 12 per cent on proof that the debtor had violated an engagement made to the creditor to put him in possession of a farm as collateral security. 356
- See MORTGAGORS, 1. SALES, 3. DEBTS, 2, 4. WIDOWS, 4. SURETY, 4.

JAGEER.

See RENT FREE TENURE, 2.

JOBRAJ.

See INHERITANCE, 3.

JOINT PROPERTY.

See SALES, 2. SURETY, 3. HINDOO LAW, 1. LIMITATION, 5.

JOINT PROPRIETORS.

See LIMITATION, 4.

JUNGULBOOREE TENURE.

See ASSESSMENT, 1.

JURISDICTION.

See MORTGAGES, 3. PRACTICE, 11.

KHUNDAIT.

See ASSESSMENT, 3.

KRITRIMA.

See ADOPTION, 2.

LANDHOLDERS.

See ASSESSMENT, 2.

LEASES.

- 1 A lease granted in perpetuity by the Collector of Benares, will not at the grantee's death devolve on his heirs, if it have not been confirmed by the Board of Revenue or Government. 52
 - 2 A *Mokurrere* lease of lands in Zillah Behar continued to the heir of the grantee, the successor of the grantor not proving that it was a life grant only. 332
 - 3 The Court ordered a lease to be cancelled, though it contained no mention of a term; it not being expressly declared to be perpetual, and appearing to have been granted to the same person, on the same day, and for the same lands as a deed of mortgage, and therefore evidently intended only as an additional security for a debt. 372
- See SURETY, 2.

LEGITIMACY.

See SHARES, 2.

LEGITIMATE CHILDREN.

See VERBAL BEQUESTS, A. SHARES, 2.

LENDER.

See BORROWER, 1.

LESSEES.

See SURETY, 2.

LIMITATION.

- 1 The claim by a Moosulmaan woman to a share of her deceased father's property dismissed as not having been preferred for more than 12 years after his death. 32
- 2 In a suit by a Hindoo for a share of his maternal grandfather's property, held that the rule of limitation should be reckoned from the period of his mother's or grandmother's death, and not from that of his grandfather's second widow, who had got possession under a decree of Court; his right having begun to accrue on the death of the former persons. Maternal grandsons by different mothers take *per capita* and not *per stirpes*. 100
- 3 In a claim preferred after the period prescribed by the regulations it is not requisite to declare that the adverse possession was acquired by fraud or violence, if that can be gathered from the plaint; and a plea of insanity set up by the plaintiff, not having been investigated, a review of judgment was allowed by the Sudder Dewanny Adawlut, and the case sent back for a new trial. 162
- 4 In a suit by a joint proprietor to separate possession of his share, the defendant urging that he had exclusive possession long before the Company's Government, without being able to prove exclusive right,

held that the rule of limitation does not apply. 202

- 5 Held that lapse of time does not bar the right to a division of a joint estate, the several proprietors of which had entered into separate engagements for their respective shares, though such shares had never been actually separated. 219
 - 6 The heir of a widow claims her dower from her late husband's estate under a deed executed by him before the Company's accession to the Dewanny; held that the claim is inadmissible, the truth of the demand not having been acknowledged within twelve years prior to the institution of the suit. 292
- See WIDOWS, 1, 2.

MAINTENANCE.

- 1 Where the widow of a Hindoo is excluded by law from inheriting her husband's property, the Courts are authorized to fix the amount of maintenance receivable by her from her husband's heirs, with reference to the circumstances of the family. 223
- See WIDOWS, 3. ILLEGITIMATE SONS, 1.

MAJORITY.

See GUARDIANS, 1. PRACTICE, 7.

MALIKANA.

- 1 The original proprietor of lands granted by the ruling power on a tenure (*Aymah*) free of assessment, having, together with his successors, for a series of years received a fixed sum from the grantor in lieu of his proprietary rights, the person to whom those rights may be subsequently transferred has no claim to *Malikana* at the rate of ten *per cent*. 278

MARRIAGE.

- 1 According to the Moohummudan law, a man cannot marry his wife's sister, his wife being alive; but the second marriage will not invalidate the first, and according to the same law, the heirs being a widow, a mother, and a half sister, the property should be made into 13 parts, of which three belong to the widow, four to the mother, and six to the half sister. 210

MEASUREMENT.

See ASSESSMENT, 1.

MINUTANA.

See DEBTS, 4.

MINORITY.

See GUARDIANS, 1.

MINORS.

See GUARDIANS, 1.

MISSING PERSONS.

See WIDOWS, 1. Note, page 30.

MISTRESS.

See PRACTICE, 3.

MOKURREREE.

See LEASES, 2. Note, page 334.

MOOHUMUDAN LAW.

- 1 According to the Moohummudan law there is no right of representation; in other words, a man shall not inherit with his paternal uncle if his father died before his father's father. 404
- See* PARENTAGE, 1. SHARES, 2. INHERITANCE, 4. EVIDENCE, 1. MARRIAGE, 1.

MORTGAGEES.

See MORTGAGES, 2, 3, 6.

MORTGAGES.

- 1 A. having lent 10,000 rupees on mortgage of lands to B. and afterwards borrowed from C. 5,000, on an agreement that C. should have half the annual profits of the mortgage, and A. having given to C. as security, the custody of the mortgage bond, but retained the documents authorizing him to make the collections, held that this is a simple transaction between A. and C. the former being accountable to the latter, without reference to the proceeds of the mortgaged estate. 43
- 2 In a case of mortgage with conditional sale, the tender to the mortgagee of the money borrowed, by a stranger to the transaction, is not sufficient to prevent a foreclosure. 54
- 3 The Sudder Dewanny Adawlut will uphold a decree of the Supreme Court, in favour of a mortgagee founded on a bond to confess judgment, although the foreclosure of the mortgage may be contrary to regulation 17, 1806, the mortgagor having voluntarily subjected himself to the jurisdiction. 111
- 4 Where a mortgage of an entire talook has been executed by its several proprietors in one and the same transaction, an action by one of the proprietors for the redemption of his own particular share only will not lie. 159
- 5 Judgment having been given against a mortgagor who sued to redeem the mortgaged property, on the plea that he had tendered repayment of the money borrowed, held that the mortgagee is not

VOL. III.

thereby entitled to foreclosure without recourse to the rules prescribed by regulation 17, 1806. 225

- 6 The uncles of the plaintiff having mortgaged their shares of an estate to two individuals, and on those mortgages absconding having made a second mortgage to another individual, from whom the plaintiff redeemed the property, held that a private distribution made among themselves by the first and second mortgagees cannot avail, as the first mortgagees had a right either to the whole or to some part of the mortgaged property. 298

See MORTGAGOR, 1. CONDITIONAL SALES, 1. LEASES, 3. PRACTICE, 18, 19.

MORTGAGORS.

- 1 A mortgagor is entitled to recover possession of an usufructuary mortgage, on payment of the principal sum borrowed; the question as to interest being left open for future adjustment. 3
- See* MORTGAGES, 3, 5. Note, page 4.

MOTHERS.

- See* SHARFS, 1, 2. HEIRS, 3. LIMITATION, 2. ADOPTION, 1. MARRIAGE, 1. INHERITANCE, 8.

MOUNTAINOUS LAND.

See INHERITANCE, 3. "

NATIVE OFFICERS.

See BORROWER, 1. DEFALCATION, 1.

NEPHEWS.

See INHERITANCE, 2. ENDOWMENTS, 1.

NOTICE.

- 1 Held that according to the spirit of the rule contained in section 5, regulation 18, 1814, a second notice was requisite on a sale being postponed, whether the postponement arose from unavoidable cause or otherwise, and that the provisions of section 9, regulation 11, 1822, modifying the rule above quoted, are not applicable in trying the merits of an appeal from a decision passed previously to the promulgation of the latter enactment. 242
- See* SALES, 1, 9.

OBLIGATIONS.

See PRACTICE, 3/

PARENTAGE.

- 1 According to the Moohummudan law, the declaration of a person of unsound mind is insufficient to establish parentage; or even of sound mind, where the parentage is claimed by another. 23
- See* SHARES, 2.

PARTNERS.

See BANKING CONCERN, 1.

PARTNERSHIP.

See SALES, 2.

PATNA CAUSE.

See Note, page 196.

PATRIMONIAL PROPERTY.

See VERBAL BEQUEST, 1.

PAUPER.

See PRACTICE, 5. Note, page 172.

PAYMENT.

See MORTGAGORS, 1. SURETY, 1. DEBTS, 2, 4. SALES, 5, 6. SIFPLAND, 1. INTEREST, 4. PRACTICE, 15.

PERPETUITY.

See LEASES, 1.

PLAINTIFFS.

See SURETY, 2, 3. EVIDENCE, 1. LIMITATION, 3. MORTGAGES, 6. PRACTICE, 15.

PLEAS.

See DOWER, 1. DURISS, 1. SURETY, 2. EVIDENCE, 1. LIMITATION, 4. PRACTICE, 9. SALES, 10.

POSSESSION.

See PRACTICE, 1, 16. LIMITATION, 2, 3, 4. MORTGAGORS, 1. WIDOWS, 3, 4. DEBTS, 3. GIFTS, 2. ALTUGHHA LANDS, 1. SETTLEMENT, 1. SALES, 5, 11. DOWER, 2. ENDOWMENTS, 1.

POSTPONEMENT.

See NOTICE.

PRACTICE.

- 1 The proprietary right having been formally investigated and decided on, in a summary suit by a register, whose decision on a regular appeal having been erroneously admitted from it, was reversed by the Provincial Court; the Sudder Dewanny Adawlut on a summary appeal, did not think proper to touch the reversal, but specially directed that the property in possession before the dispute should not be disturbed. 3
- 2 Held that a woman having preferred a claim against her father-in-law for certain real and personal property, and her claim being dismissed, it is not competent to the Court to award her a monthly allowance payable by the defendant, no such claim having been preferred by her. Order for costs of suit to be paid by the successful party reversed. 44

3 A dancing girl having left her mistress by whom she had been purchased when a child and educated, and having discontinued the payment of a monthly allowance to which she had bound herself by a written obligation; on a suit by the mistress to enforce the engagement or recover the girl, claim disallowed, the girl not being legally a slave, and the mistress not having proved that what had already been received was insufficient to cover the expense of her education. 141

4 In a suit in which both parties are *Sheeas*, the Court will decide agreeable to the doctrines of that sect; and, according to the law of inheritance prevailing among them, a brother is entirely excluded by a daughter. 164

5 Held that a special appeal preferred by a pauper in a suit instituted subsequently to the 1st of February 1815, could not be entertained. *but see note.* 172

6 A deed having been declared inadmissible by a zillah decree, from which an appeal was preferred, but subsequently withdrawn by *rataanamah*, held that the production of such decree is not sufficient to preclude enquiry into the authority of the deed in a subsequent suit. 200

7 In a case of review of judgment, two Judges being of opinion that the decree reviewed should be reversed, and two that it should be affirmed, one of the latter having joined in passing the decree reviewed, and the Judge who concurred with him in that decision having since died; held that the opinion of the deceased Judge should be taken into account, so as to create a majority without the necessity of calling in a fifth Judge. 234

8 Judgment of the Sudder Dewanny Adawlut declared conclusive against two interlocutory claimants, their claim virtually rejected by the zillah decree not having been brought forward on appeal to the Provincial Court, nor supported by a separate action. 266

9 Claim to an estate by an *eldest* of the deceased proprietor under an alleged deed of gift. Suit dismissed with costs, as the document had not been produced in a former action brought by the widow against the present claimant, when on his plea of adoption proving untenable, a deed had been filed in Court, by which he admitted her right to the succession, which deed, although now disclaimed by him, had been duly recorded, and carried into effect without opposition at the time. 275

10 A *tehsildar* in Allahabad having caused certain lands lying within the limits of his authority to be purchased at a public sale in the name of his minor son, and the same being resumed by Government under the regulations of 1803, on satisfactory evidence that the lands were held

- 9 Public sale by auction of a defaulter's lands set aside on the ground that notice of the intended sale was not published on the estate. 325
 - 10 An auction sale by a collector of defaulter's lands set aside on the ground that he had purchased the lands on account of Government, and that he had refused a higher bid. Plea that the latter circumstance could only entitle the defaulter to compensation overruled. 351
 - 11 Lands purchased by a father in the name of his son, though registered in the name of the latter, being in the possession of the former, and *bona fide* his property, the son has no right to dispose of them. 363
- See Note, pages 8, 90, 327. **CONDITIONAL SALES, 1. SURETY, 4. ADOPTION, 3. NOTICE, 1.**

SAPINDAS.

See Note, page 32.

SECURITY.

See **MORTGAGES, 1. SURETY, 1. INTEREST, 8. LEASES, 3.**

SELLERS.

See **CONDITIONAL SALES, 1. BILL OF EXCHANGE, 1. SALES 6, 7.**

SETTLEMENT.

- 1 Claim to set aside a settlement made by the Collector with the sanction of the Board of Revenue rejected; it appearing that the claimant's ancestor had been in possession as farmer only, and claim not having been advanced until eight years after the conclusion of that settlement. 226
 - 2 A settlement having been made with one individual as proprietor, held that, under clause 8, section 53, regulation 27, 1803, a Collector is not competent to substitute another individual without a judicial decree. 239
- See **ASSESSMENT, 4.**

SHARES.

- 1 The claimants to a Moosulmaun's property being three widows, three daughters, a mother and a brother, the property should be made into 72 parts, of which the widow should get 9, the daughters 48, the mother 12, and the brother 3, and one of the daughters dying before the distribution, the estate should be made into 216 parts and the shares of all the claimants (except the two stepmothers) proportionably augmented. 46
- 2 According to the Moohummudan law continual cohabitation and acknowledgment of parentage form sufficient presumptive evidence of wedlock and legitimacy; and the heirs being two widows, a

mother, and a son, the property should be made into 48 parts, of which the widows are entitled to 6, the mother to 8, and the son to 34. 152

See **LIMITATION, 2, 4, 5. SURETY, 3. INHERITANCE, 8. MARRIAGE, 1. MORTGAGES, 4, 6. PRIMOGENITURE, 2. Note, pages 61, 103, 156, 298.**

SHEEAS.

See **INHERITANCE, 5.**

SHOPKEEPERS.

See **ACCOUNTS, 1.**

SISTERS.

See **DOWER, 1. INHERITANCE, 1. HEIRS, 3. MARRIAGE, 1.**

SISTER'S SONS.

See **INHERITANCE, 1, 4,**

SLAVES.

See **PRACTICE, 3.**

SONS.

See **INHERITANCE, 1, 8. WIDOWS, 1. HEIRS, 1, 3. SHARES, 2. ADOPTION, 4, 6.**

SOOBADAR.

See **ASSESSMENT, 3.**

SPECIAL APPEALS.

See **PRACTICE, 5. INTEREST, 5.**

STEP-SONS.

See **WIDOWS, 3.**

STIPEND.

- 1 A judicial order for the payment of a monthly stipend to a certain individual is not held to entitle his heirs to claim it after his death. 134

SUMMARY APPEALS.

See **PRACTICE, 1.**

SUNNUD.

See **DEPENDANT TALOOK.**

SUPREME COURT

See **DEBTS, 1. MORTGAGES, 3.**

SURETY.

- 1 The Court of Sudder Dewanny Adawlut will not enforce the payment of a sum of money promised by A. to B. if the security tendered by the latter for the former, in consideration of which the promise

was made had never been acted upon, even though the promise was absolute. 51

2 The surety of a fictitious lessee is not entitled to sue for profits on the plea that the lease had been unjustly cancelled, and that he (the plaintiff) was the real lessee. 83

3 In a suit brought by certain joint Hindoo proprietors against the Collector and the surety of their copartner (who was treasurer and had defaulted and absconded) for the recovery of their shares of the joint property, which had been sold on account of the defalcation, judgment in favour of the plaintiffs, and held that the surety was solely liable, he having pointed out the property as exclusively belonging to the defaulter. 98

4 A sale having been made by a debtor to his surety, and set aside as having been extorted by violence, the Court will nevertheless compel the debtor to pay to his surety the amount (principal and interest) which had been borrowed on the credit of the surety, declaring at the same time that the latter should be responsible to the original creditor. 156

See DEEALCATION, 1. BILL OF EXCHANGE, 1. INTEREST, 4.

TEHSILDARS

See ASSESSMENT, 4.

TITLE

See ENDOWMENTS, 1.

TENDER

See MORTGAGES, 2.

TRANSFER.

See HINDOO LAW, 1.

TRANSLATIONS.

See SALES, 1.

VERBAL BEQUESTS.

1 According to the Armenian law a verbal bequest of self-acquired property to an illegitimate son is good, there being no legitimate children; but such a disposition of patrimonial property is not valid to the exclusion of the legal heirs. And on proof that such illegitimate son, after the death of his father, virtually acknowledged the right of his heirs, by taking out probate, and benefiting under the will of his great uncle, and by entering into a compromise with his great uncle's daughter for her share of the property; the Court held that the verbal bequest should not avail. 9

VICINAGE.

See SALES, 2.

UNCLES.

See MORTGAGES, 6. ADOPTION, 5. PRIMO-GENITURE, 2. MOOHUMMUDAN LAW, 1.

UNDERTAKING.

See BANKING CONCERN, 1.

UNDIVIDED SHARES.

See WIDOWS, 2. Note, pages 22, 140.

USUFRUCT.

See MORTGAGORS, 1.

WIDOWS.

1 The widow of a son who died before his father, is not entitled to inherit the father's estate according to the Hindoo law; and 12 years is allowed for the reappearance of a missing person, after which his death will be presumed. 28

2 The right of a widow is not necessarily forfeited by her omitting to apply for separate possession of her husband's undivided share for more than 12 years after his death. 30

3 A widow (Hindoo) has no claim upon her step-grandson or her step-son's widow for maintenance while she has a step-son living, who alone is bound to maintain her, even though the others are in joint possession with him of her husband's estate. 70

4 The decrees of a Court below in favour of a Hindoo widow for possession of her husband's lauded property amended on the ground of their not having specified the nature of her interest and the mode in which the property should be disposed of after her death. 114

See DOWER, 1, 2. HEIRS, 1, 2, 3. INHERITANCE, 4, 5, 7, 8, 9. LIMITATION, 6. MARRIAGE, 1. MAINTENANCE, 1.

WILLS.

See VERBAL BEQUESTS, 1.

WIVES.

See GIFTS, 4.

WUQF.

See ENDOWMENTS, 2.

ZUMEENDAREE POTTAH.

See ASSESSMENT, 4.

